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UNITED STATES OF AMERICA.

THE FIRST CHARTER

AND

THE EARLY RELIGIOUS LEGISLATION OF MASSACHUSETTS.

A LECTURE

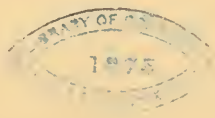
IN A

COURSE ON THE EARLY HISTORY OF MASSACHUSETTS,
BY MEMBERS OF THE MASSACHUSETTS
HISTORICAL SOCIETY,

At the Lowell Institute, Boston,

Delivered Feb. 9, 1869.

By JOEL PARKER.



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THE FIRST CHARTER

AND

THE EARLY RELIGIOUS LEGISLATION

OF MASSACHUSETTS.

IT has been regarded as a subject of complacency, that we know our origin, and can trace our history; that while other communities seek their early history in the mists of conjecture, or the myths of tradition, we can trace our own, in that documentary evidence which gives the greatest degree of certainty.

To a considerable extent, this is true. And yet there are particulars, essential to a right understanding of the principles upon which the original settlement of Massachusetts was made, respecting which there has been, and now is, such a diversity and discrepancy of opinion, after all the discussions of two hundred years, and after the labors of the Massachusetts Historical Society, for three quarters of a century, in collecting documents in regard to the subject, that the Ends and Aims of the first settlers of Massachusetts furnish the leading topic of the present course of lectures, in the hope that the errors which have prevailed on that subject may be corrected, and the purposes and objects of the founders of the Commonwealth may be more clearly and generally understood.

It is not surprising that there should be misconception upon this subject, when it is considered that the materials of the history of that time are widely dispersed, and often contradictory; malice manufacturing misrepresentations, prejudice engendering error, and mistake and carelessness causing fact and fiction to be so intermingled, that it is not seldom that the discovery of truth is a laborious task.

How many persons there are in the community, who, at this day, suppose that the celebrated so-called "Blue Laws of Con-

necticut" are the veritable legislation of the Puritan Colony there! The fact that one of them purports to provide, that "No one shall run on the Sabbath day, or walk in his garden or elsewhere, except reverently to and from meeting;" and another that "No woman shall kiss her child on the Sabbath, or on a fasting day," — might lead to a doubt;[1] but all this is deemed consistent with the spirit of the time, enforcing a strict observance of that holy day.

How few persons know that many of these "Blue Laws" are but the jokes of the wits and humorists of a subsequent age, for the purpose of sport and ridicule, having no enduring existence until Dr. Samuel Peters collecting, and probably adding to them, inserted, in what purported to be "A General History of Connecticut," a sketch, as he said, of laws made by the independent Dominion of New Haven, denominated "Blue Laws" by the neighboring colonies, and never suffered to be printed![2] The whole work has been shown to be so untruthful that the appearance of these so-called "Blue Laws" there, is of itself *primâ facie* evidence that they are fictitious.[3]

If we consider what a vast mass of contradictory material has accumulated within the last decade, to perplex the future historian of the late war, we shall cease to wonder that much may be done, even at the present day, by a diligent student of history, to elucidate the ends and aims of the Puritan Fathers of 1630.

It is because of the dispersion of material, and of the contradictory opinions which have been entertained respecting the rights, objects, and purposes of the founders of the Commonwealth, that I have deemed it not only a duty, but a pleasure, to answer the call made upon me to add a small contribution, such as it may be, to the present attempt of the Historical Society to illustrate the early history of Massachusetts.

The subject assigned to me is "the Religious Legislation of Massachusetts," — involving, of course, the inquiry how far any

[1] Another may furnish Congress with a model of brevity, in making up an "omnibus bill," near the close of a session: "No one shall read Common Prayer, keep Christmas or Saints days, make minced pies, dance, play cards, or play on any instrument of music, except the drum, trumpet, and jews-harp."

[2] See Gen. Hist. Conn. 63.

[3] See Prof. Kingsley's Hist. Discourse at New Haven, 1838. pp. 35, 56, 83, 104.

such legislation was lawful under the original charter, — and this, in turn, depending upon the question, to what extent the grantees had any right of legislation, properly so called, by the provisions of that instrument.

Upon this question the opinions have been much at variance, according as the charter has been regarded as instituting a corporation for trading purposes, or as the constitution and foundation of a government. That the grantees who settled here regarded it as the latter, and acted upon that construction, is apparent from their action at the outset, and throughout. But those opposed to them, contended at the time, that the former was its true intent and meaning, and historians have perpetuated that opinion. Minot, in his History of Massachusetts, says, —

"This charter, from the omissions of several powers necessary to the future situation of the Colony, shows us how inadequate the ideas of the parties were to the important consequences which were about to follow from such an act. The Governor, with the assistants and freemen of the company, it is true, were empowered to make all laws, not repugnant to those of England; but the power of imposing fines, mulcts, imprisonment, or other lawful correction, is expressly given according to the course of other corporations in the realm; and the general circumstances of the settlement, and the practice of the times, can leave us no doubt that this body-politic was viewed rather as a trading company residing within the kingdom, than, what it very soon became, a foreign government exercising all the essentials of sovereignty over its subjects." [1]

He proceeds to speak of divers laws as having been made by the grantees, of their own motion and without any authority under the charter, and, after referring to the force of habits and prejudices, adds, —

"But such was the force of these habits and prejudices, and so prone are mankind to place unlimited confidence in their government, when unprovoked by the usurpation and abuse of power, that the people of Massachusetts may be said to have submitted to a system of laws, by which the freedom of action was abridged, and to have voluntarily yoked themselves to an ecclesiastical authority, by which the rights of conscience lost, for a time, the very principles that their emigration had avowed."

Bancroft, who aspires to be the historian of the United States, writes, —

[1] See Minot, p. 19.

"The charter, which bears the signature of Charles I.,[1] and which was cherished for more than half a century as the most precious boon, established a corporation, like other corporations within the realm. The associates were constituted a body-politic by the name of the Governor and Company of the Massachusetts Bay in New England. The administration of its affairs was intrusted to a governor, deputy, and eighteen assistants, who were to be annually elected by the stockholders or members of the corporation. Four times a year, or oftener if desired, a general assembly of the freemen was to be held; and to these assemblies, which were invested with the necessary powers of legislation, inquest, and superintendence, the most important affairs were referred. No provision required the assent of the King to render the acts of the body valid; in his eye it was but a trading corporation, not a civil government; its doings were esteemed as indifferent as those of any guild or company in England; and if powers of jurisdiction in America were conceded, it was only from the nature of the business in which the stockholders were to engage." — "The charter designedly granted great facilities for colonization. It allowed the company to transport to its American territory any persons, whether English or foreigners, who would go willingly, would become lieges of the English king, and were not restrained 'by especial name.' It empowered, but it did not require the Governor to administer the oaths of supremacy and allegiance; yet the charter, according to the strict rules of legal interpretation, was far from conceding to the patentees the privilege of freedom of worship. Not a single line alludes to such a purpose; nor can it be implied by a reasonable construction from any clause."

He says further, — "The political condition of the colonists was not deemed by King Charles a subject worthy of his consideration. Full legislative and executive authority was conferred not on the emigrants, but on the company, of which the emigrants could not be active members, so long as the charter of the corporation remained in England. The associates in London were to establish ordinances, to settle forms of government, to name all necessary officers, to prescribe their duties, and to establish a criminal code. Massachusetts was not erected into a province, to be governed by laws of its own enactment; it was reserved for the corporation to decide what degree of civil rights its colonists should enjoy."

Again, — "The charter on which the freemen of Massachusetts succeeded in erecting a system of independent representative liberty, did not secure

[1] This, by the way, is a mistake in the outset. Charles Cæsar, the Master in Chancery, before whom Governor Cradock took the oath of office, and whose name is appended to a certificate of that fact, at the bottom of the charter, was not Charles I.

to them a single privilege of self-government; but left them, as the Virginians had been left, without one valuable franchise, at the mercy of a corporation within the realm. This was so evident, that some of those who had already emigrated, clamored that they were become slaves.[1]

"It was equally the right of the corporation to establish the terms on which new members should be admitted to its freedom. Its numbers could be enlarged or changed only by its own consent.

"It was perhaps implied, though it was not expressly required, that the affairs of the company should be administered in England; yet the place for holding the courts was not specially appointed. What if the corporation should vote the emigrants to be freemen, and call a meeting beyond the Atlantic? What if the Governor, deputy, assistants, and freemen should themselves emigrate, and thus break down the distinction between the colony and the corporation?[2] The history of Massachusetts is the counterpart to that of Virginia: the latter obtained its greatest liberty by the abrogation of the charter of its company; the former by a transfer of its charter, and a daring construction of its powers by the successors of the original patentees."[3]

Now I may remark that it is quite possible Charles I. was not very careful to scrutinize the effect of the powers which he assumed to confer by the charter.

The lands granted (with a vast extent of territory besides, claimed by the Crown) were, notwithstanding the glowing accounts of some navigators respecting the fisheries, deemed of such small importance that they came very near falling entirely under the jurisdiction of other governments, from the mere neglect of the English Government to take possession; and so far as any direct independent action of the Crown was concerned, such would have been their fate. The patent to the Great Council of Plymouth, procured by individuals, probably saved them as a British possession.

And along with this supposition of a lack of value in the territory, King Charles could not have been ignorant of the general character, political and religious, of the proposed emigrants, and might well have considered that it was quite immaterial what

[1] These were the "old planters," — squatters, before the charter was granted.

[2] If they might do so, it would appear that the charter did secure to them some privileges of self-government, and that they were not necessarily at the mercy of a corporation within the realm.

[3] See Bancroft, vol. i. pp. 342–345.

powers were given to the grantees, to be exercised on the other side of the Atlantic, if thereby England would be rid of a class of people imbued with notions of republican freedom, and likely to be very troublesome as nonconformists, if they remained there.

If he could have cleared his kingdom of many more of a similar character, by a like process, he would have saved his crown and his life.

On the other hand, it is possible that the grantees were not fully aware of the extent of the powers conferred by the charter as they subsequently construed its provisions; but this admits of grave doubt. We may safely infer that the original draft was made by counsel employed by the applicants, and submitted to the crown lawyers for examination. It is not to be supposed that the crown officers would undertake the duty of preparing a document which had so much of a private character attached to it; and as it bears upon its face evidence that it was very carefully drawn up, apparently, so as to confer power without giving offence, we can hardly make a presumption that none of the grantees understood its full scope and effect. It is quite clear, however, that they did not anticipate such an influx of emigration that the very success of their experiment, so far as population was concerned, should have been its overthrow in some of its most important religious aspects.

But the question is not so much what the King, or other persons, may have supposed respecting the subject, as what provisions were contained in the charter.

Whatever rights the charter purported to grant, vested lawfully in the grantees.

The title to unoccupied lands belonging to Great Britain, whether acquired by conquest or discovery, was vested in the Crown. The right to grant corporate franchises was one of the prerogatives of the King. And the right to institute and to provide for the institution of colonial governments, whether by charter, proprietary grant, or commission, was likewise one of the prerogatives. Parliament had then nothing to do with the organization or government of colonies.

The confirmation, therefore, in the charter, of the grant of the lands from the Council of Plymouth (which derived title from

the grant of James I., and which could grant the lands, but could not grant nor assign powers of government), with a new grant, in form, of the same lands, gave to the grantees a title in socage; substantially a fee-simple, except that there was to be a rendition of one-fifth of the gold and silver ores. The grant of corporate powers, in the usual form of grants to private corporations, conferred upon them all the ordinary rights of a private corporation, under which they could dispose of their lands, and transact all business in which the company had a private interest. And the grant of any powers of colonial government, embraced in the charter, was valid and effective to the extent of the powers which were granted, whatever those powers might be; the whole, as against the corporation, being subject to forfeiture for sufficient cause.

The grant and confirmation of the lands, and the grant of mere corporate powers for private purposes, were private rights, which vested in the grantees; and which the King could not divest, except upon some forfeiture regularly enforced. Upon such forfeiture, the corporation would be dissolved, and all of the lands belonging to it would revert, in the nature of an escheat. But this would not affect valid grants previously made by it.

The grant of power to institute a colonial government, being a grant not for private but for public purposes, may have a different consideration. Whether by reason of its connection with the grant of the lands and of ordinary corporate powers, it partook so far of the nature of a private right, that it could not be altered, modified, or revoked, except on forfeiture, enforced by process; or whether this part of the grant had such a public character, that the powers of government were held subject to alteration and amendment; — is hardly open to discussion. At the present day it is held, that municipal corporations, being for public uses and purposes, have no vested private rights in the powers and privileges granted to them, but that they may be changed at the pleasure of the government. That principle seems to be equally applicable to a grant of colonial powers of government; and the better opinion would seem to be, that it was within the legitimate prerogative of the King, at that day, to modify, and even to revoke, the powers of that character which

had been granted by the Crown, substituting others appropriate for the purpose.[1]

If the King had assumed to revoke the powers of government granted by the charter, without substitution, or if he had imposed any other form of government, by which the essential features of that which was constituted under the charter would have been abrogated, it might have been an arbitrary exercise of power, justifying any revolutionary resistance which the Colony could have made. But the Crown, under the then existing laws of England, must have possessed legally such power over the Colony as the legislature may exercise over municipal corporations at the present day. The charter, so far as the powers of government were concerned, could not be treated as a private contract.

The charter was originally the only authority for the government of the territory embraced in it. The Council at Plymouth, in the county of Devon, never attempted to exercise powers of government over the Colony of Massachusetts; and there was no compact or agreement to form a government. The grantees professed, in all they did, to act under the charter, and, as they contended, according to the charter.

We are to look to the terms of the charter, therefore, and to a sound construction of its provisions, to ascertain what rights of legislation, religious or otherwise, were possessed by the grantees.

The charter bears date March 4, 1628 [29].

From a careful examination of it, I have no hesitation in maintaining five propositions in relation to it.

1. The charter is not, and was not, intended to be an act for the incorporation of a trading or merchants' company merely. But it was a grant which contemplated the settlement of a Colony, with power in the incorporated company to govern that

[1] If this distinction between public and private corporations, well settled at the present time, was not then recognized, it is not because there has been a change of principle since that period; but because the principles which govern these two descriptions of corporate rights were not then well developed; and hence the claim of the Crown to power over both public and private rights, and the claims of the colonists under their charter, without any distinction between the two. When a right application is made of this principle to the colonial history, it will show that the complaints of the colonists of infringement of their charters were not all well founded.

Colony. — This is shown from its whole structure, in the provisions relating to government, which I shall specify particularly under the other propositions, and moreover in the power given —

"to the Governor and Company, and their successors," — "that it shall and may be lawful to and for the chief commanders, governors, and officers of the said company for the time being who shall be residents in the said part of New England in America by these presents granted, and others there inhabiting, by their appointment and direction, from time to time, and at all times hereafter, for their special defence and safety; to encounter, expulse, repel, and resist, by force of arms and by all fitting ways and means whatsoever, all such person and persons, as shall at any time hereafter attempt or enterprise the destruction, detriment, or annoyance to the said plantation or inhabitants, and to take and surprise by all ways and means whatsoever, all and every such person or persons with their ships, armor, munition, and other goods, as shall in hostile manner invade, or attempt the defeating of the said plantation, or the hurt of the said company and inhabitants."

Here is a complete grant of the power to make defensive war, without any order from, or recourse to, the Crown; and, of course, according to the judgment of the company and its officers.

2. The charter authorized the establishment of the government of the Colony within the limits of the territory to be governed, as was done by the vote to transfer the charter and government.

I am aware that Mr. Justice Story, in his Commentaries on the Constitution, says, "It is observable that the whole structure of the charter presupposes the residence of the company in England, and the transaction of all its business there."[1] But that position cannot be maintained. I venture to say, that there is no provision in the charter, which either expressly, or by implication, presupposes such residence. On the contrary, if it cannot be asserted that the whole scope of the charter contemplates the establishment of the government within the Colony, it will be found that it contains provisions which it would have been next to impossible to execute, except by a transfer of the charter and government to the place to be governed.

[1] 1 Story's Com. on the Const. § 64.

The charter provides that there shall, or may be, four general assemblies, which shall be styled and called the four great and General Courts of the company, in which, in the manner there provided, the Governor, or deputy, and such of the assistants and freemen of the company, as shall be present, "shall have full power and authority to choose, nominate, and appoint such, and so many others, as they shall think fit, and that shall be willing to accept the same, to be free of the said company and body, and them into the same to admit; and to elect and constitute such officers as they shall think fit and requisite, for the ordering, managing, and despatching of the affairs of the company."

Is it possible to believe that none of the emigrants, — the very men most interested in the administration of the affairs of the company, — were to be admitted as freemen, so as to have a voice? It would seem much more probable that it should have been intended they should form a majority. But how were they to attend the four General Courts, if these were held in England?

The clauses in relation to the election and removal of officers, and to the administration of the oaths of office, are still more significant.

"Yearly, once in the year," namely, the last Wednesday in Easter term, the Governor, deputy governor, and assistants, and all other officers of the company, were to be "newly chosen for the year ensuing," in the General Court, or assembly, to be held for that day and time, by the greater part of the company, for the time being, then and there present. And in case the Governor, deputy governor, any of the assistants, or *any other of the officers* to be appointed for the company, should die, or be removed (power being given to the company to remove for any misdemeanor or defect), it was made lawful for the company, in any of their assemblies, to proceed to a new election in the place of the officer so dying or removed; "and immediately upon and after such election," the authority, office, and power, before given to the officer removed, were to cease and determine.

By another provision of the charter, the Governor, deputy governor, assistants, and all other officers to be appointed and chosen, were required before they undertook the execution of their respective offices, to take an oath for the faithful perform-

ance of their duties. The Governor was to take the oath of office before the deputy governor, or two of the assistants; and the deputy governor, and assistants, and *all other officers chosen from time to time*, were to take their oaths before the Governor of the company.

It is readily seen that these provisions of the charter could be conveniently executed, if the company was within the Colony, and the government administered there. And a very slight examination shows how nearly impossible it would be to execute them, if the Colony was to be governed by a company in England. In the case of the death of the incumbent of an office, the duties of which were to be performed in the Colony, it would take a month for the intelligence of the decease to reach the company in England, and at least a month or six weeks more, ordinarily a much longer time, for a notice of the new election to reach the Colony; during which time, there would be no regular officer to perform the duties.

Is it answered that provision could be made by law, that in such case the duties should be performed by some other officer? That will not apply to the case of a removal, as it could not be known that the officer was removed, until a month or six weeks after the removal was made, and yet the office would be vacated at the time of the removal by the company in England; the officer performing acts supposed to be official, but which would be void.

The provision in relation to the oaths of office would be more nearly impracticable. All the officers, as we have seen, whether newly elected at an annual election, or to fill vacancies occasioned by death or removal, were to take the oath of office before they could execute the duties of the office; so that if the company remained in England, and the General Courts were held there, all the officers chosen for the managing and despatching of the affairs of the company, who resided in the plantation, and most of them must be there, would have to go to England to take their oaths of office, before they could execute their offices; or, the Governor would be obliged to be in the plantation to administer the oaths there, after notice who were elected; and after each annual election, the deputy governor, or two assistants, must first administer the oath to him, before he could go to the

plantation, or if he were there, must go themselves to the plantation to find him, and administer the oath there, before he could administer the oaths to others. Such a state of things would furnish too great a temptation, in any but a Puritan community, to some other oaths than oaths of office.

It has been suggested that in the clause authorizing the General Court to make laws, there is a provision which would authorize a law, by which other persons than the Governor, deputy governor, or assistants, might administer oaths; and this may be true in relation to oaths to be administered to any officers, other than "all other officers to be hereafter chosen as aforesaid, from time to time," by the company, although the provision refers more particularly to laws prescribing the *forms* of oaths than to the administration of them, as will be seen by a reference to the provision itself.

If, however, it is assumed that it conferred power to make laws for the administration of oaths by such persons as the laws of the Colony should prescribe, it must be limited to officers other than those chosen by the company. It could not be construed to authorize a law providing for the administration of oaths to the Governor, deputy governor, assistants, or to "all other officers to be appointed and chosen as aforesaid" (that is, to all officers of the company), otherwise than according to the special provisions of the charter already considered prescribing before whom they should take their oaths; for, thus construed, it would give a power to make laws contradictory to the provisions of the charter itself, which would be a construction entirely inadmissible.

No general provision authorizing the making of laws, "for the settling of the forms and ceremonies of government and magistracy," "for naming and styling of all sorts of officers, both superior and inferior," for "setting forth the duties, powers, and limits, of every such office and place, and the forms of such oaths warrantable by the laws and statutes of this our realm of England, as shall be respectively ministered unto them," &c., can operate to abrogate the special provisions which precede it; — authorizing the election of officers, annual elections, appointments in case of death and removal, and providing that "the newly elected deputy governor, and assistants, and all other

officers to be hereafter chosen as aforesaid, from time to time, shall take the oaths to their places respectively belonging before the Governor of the company for the time being."

Who, then, were the other officers to be hereafter chosen, as aforesaid, from time to time, respecting whom it was specially provided that they should take their oaths before the Governor? Certainly not merely the secretary, treasurer, and other persons, who should be directly connected with the meetings of the company. If the King had undertaken to plant a Colony, to prescribe the laws, and to appoint the officers; all the officers, — judges, sheriffs, attorney-general, &c., appointed by him, would have been officers of the Crown. When, instead of this, he committed the planting, ruling, appointing officers, &c., to the company; the judges, sheriffs, justices of the peace, and other officers appointed directly by the company, were officers of the company, as much so as the secretary and treasurer; and, as such, they were among the "other officers," who were required by the charter, to take their oaths before the Governor. Legislation providing for the administration of oaths to officers not appointed by the company might be valid; as would be provisions for the administration of oaths to jurymen, witnesses, &c.

If we infer that there was no supposition that the plantation would become so large as to require a great force of officers, it does not change the construction of the charter.

I admit that there were some proceedings which tend to show, that the requirements of the charter in respect to oaths were not fully understood by the members of the company generally. At the General Court in England, on the 30th April, 1629, Endicott, who had come over as governor of the plantation, before the charter was granted, was elected or confirmed as governor, and a deputy governor and council were appointed; and it was ordered, that the Governor, deputy governor, and council then in New England, should make choice of a secretary and other needful officers, and should frame and administer to them such oaths as they should think good. But this was very soon after the charter was procured, and while its provisions were imperfectly understood, as is evident from the fact that, at the same meeting, it was ordered, that Governor

Endicott, or his deputy, and the council, having taken their oaths, —

"shall have full power and authority, and they are hereby authorized, by power derived from His Majesty's letters patent, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, not contrary to the laws of the realm of England, for the present government of our plantation, and the inhabitants residing within the limits of our plantation, a copy of all which orders is to be sent to the company in England." [1]

It is quite clear, that those who passed this vote to confer upon the administrative government in the plantation — "by power," as they alleged, "derived from His Majesty's letters patent" — full authority to make laws, while the company to which the power was granted existed in England, had not an exact comprehension of the nature and character of the charter; for this vote assumed, that the power to make laws was assignable, or rather that it might be duplicated. Whether there were those who had a better knowledge, but thought that some such measure was necessary until the charter and government could be transferred, cannot now be known.

The attempt at two governments, in a modified form, continued some time afterwards.

"It was thought fit, in making the transfer, that the government of persons should be held in the plantation, and the government of trade and merchandise should be in England."

These proceedings occasioned the charge in the *quo warranto*, in 1635, that they held two councils, — one in England, and the other in America.

Authority was also given by the charter to the Governor, deputy governor, or any two assistants, to administer "the oath and oaths of supremacy and allegiance, or either of them, to all and every person and persons, which shall at any time or times go to or pass to the lands and premises" granted, to inhabit the same.

Persons, not subjects, might go with the assent of the company. Suppose there had been a disposition to administer these oaths, and all persons had been required, in conformity

[1] See Mass. Records, vol. i. pp. 38, 361, 386; Hazard's Coll., vol. i. pp. 256, 268.

with this authority, to take them: were persons proposing to emigrate, to seek, in England, for the officers authorized to administer them, and take the oaths before embarkation? Were strangers, — foreigners, — expected to do so?

The absurdity of provisions intended to operate in the manner stated, more especially in relation to removals and the administration of the oaths of office, furnishes plenary evidence that no construction was intended confining the company to England; and we are led, therefore, to the conclusion, that the transfer was not only beyond exception, but that it was perhaps contemplated by some of the parties interested, when the charter was granted.

The intrinsic difficulty of making laws for and governing such a colony by a corporation having its locality in England, would seem to be so apparent as to be evidence respecting the intent, and the true construction of the charter.

It was necessarily within the scope of the charter, that the grantees should occupy and cultivate the lands confirmed and granted by it, in the place where they were situated. It was equally, if not necessarily, within its scope, to exercise the private corporate privileges which related to those lands, in the place of their location, — and to institute and administer the political government, over the persons settled upon them, in the place which they inhabited.

There is also strong extraneous evidence to show, that there must have been a supposition, on the part of some of those concerned, that the charter and government would be transferred at an early day. Before the charter was obtained, and, it seems probable, during the time in which efforts were making to procure it, the grantees, under the grant from the Council of Plymouth, had adopted measures for the settlement of the plantation. Endicott embarked in June, 1628; arriving in September, with power to manage their affairs, and it appears with the title of Governor. A letter was addressed to him and others, April 17, 1629, informing them that the charter was obtained, confirming him as governor, and joining seven persons with him as a council. Then came the proceedings of April 30th already referred to. The experience of less than a year may have shown the necessity of having oaths of office administered in the plantation, and

of having the laws made where they were to be administered, and thus have led to the orders of that date, without much study of the charter itself, by those members of the company who had not been actively engaged in procuring it; while those who better understood its provisions, in view of the probable transfer of the charter and government in a short time, did not deem it expedient to interpose objections.

At a General Court under the charter, May 13, 1629, Cradock was elected governor of the company for the year ensuing.[1] But at a court held July 28th, "Mr. Governor read certain propositions, conceived by himself; viz., that for the advancement of the plantation, the inducing persons of worth and quality to transplant themselves and families thither, and for other weighty reasons therein contained, to transfer the government of the plantation to those that shall inhabit there, and not to continue the same in subordination to the company here, as it now is." Those present were desired privately and seriously to consider of it, and produce their reasons at the next General Court, and in the mean time to carry the business secretly that it be not divulged.[2]

This was, doubtless, in connection with the negotiations with Winthrop and others, to come over and settle. But following so closely upon the grant of the charter, and taken in connection with its provisions, the inference is strong, I think, that the matter had been previously agitated among some of those interested.

At a General Court held August 29th, the reasons *pro* and *contra* having been heard, it appeared, by a hand vote, that it was the general desire and consent of the company, that the government and plantation should be settled in New England, and it was ordered accordingly.[3]

Other evidence is derived from the fact, that no objection appears to have been made by the King or his Council, which strengthens the inference that the crown lawyers, who examined the charter, must have supposed that such a movement was probable.

Mr. Justice Story says, "The power of the corporation to make the transfer has been seriously doubted, and even denied. But the boldness

[1] Mass. Records, vol. i. p. 40. [2] Mass. Records, vol. i. p. 49.
[3] Mass. Records, vol. i. p. 51.

of the step is not more striking than the silent acquiescence of the King in permitting it to take place."[1]

If, however, we suppose that some of his councillors, when the charter was examined, saw that this might be done, the wonder ceases.[2]

Upon petition of Sir Christopher Gardiner, Sir Ferdinando Gorges, and Captain John Mason, growing in part, doubtless, out of Gardiner's grievances, and in part, probably, out of the conflict of title in the others, but representing "great distraction and much disorder" in New England, the matter was referred to the Privy Council, and examined by a committee, who heard the complainants, and divers of the principal adventurers. Whereupon, without determining certain contested matters of fact, resting to be proved by parties that must be called from the Colony, the Council, Jan. 19, 1632, "not laying the fault or fancies (if any be), of some particular men, upon the general government or principal adventurers,"[3] thought fit to declare "that the appearances were so fair, and hopes so great, that the country would prove both beneficial to this kingdom, and profitable to the particulars, as that the adventurers had cause to go on cheerfully with their undertakings; and rest assured *that if things were carried as pretended when the patents were granted, and accordingly as by the patent is appointed*, his Majesty would not only maintain the liberties and privileges heretofore granted, but supply any thing farther that might tend to the good government, prosperity, and comfort of his people there, of that place."[4] This shows, conclusively, not only that no objections were then taken by the Privy Council to the transfer of the charter and government, but that none were taken to the general exercise of the powers of a colonial government, in the manner in which the grantees were exercising them.

Winthrop, in his History of New England, referring to the first intelligence of this proceeding, says, "The principal matter

[1] 1 Story's Com., § 65.

[2] These matters are not material to the determination of the question whether the transfer was lawfully made. But the inference that it was originally contemplated seems so strong, that I have deemed it expedient to call attention to the facts.

[3] Hutch. Coll. Papers, p. 53.

[4] Hutch. Coll. Papers, p. 54; Chalm. Annals, vol. i. p. 155; Neal's Hist., p. 154.

they had against us, was the letters of some indiscreet persons among us, who had written against the church government in England." [1] But in a subsequent paragraph, having then, it is to be presumed, received a copy, he speaks of the petition, as "accusing us to intend rebellion, to have cast off our allegiance, and to be wholly separate from the church and laws of England; that our ministers and people did continually rail against the State, and church, and bishops there," &c. Sir Richard Saltonstall, Mr. Humfrey, and Mr. Cradock were called before a committee of the Council, and a hearing was had. Winthrop says further, that —

"The king, when the matter was reported to him by Sir Thomas Jermyn, one of the Council, who spoke much in commendation of the Governor, both to the lords, and afterwards to his Majesty, said that he would have them severely punished, who did abuse his governor and the plantation; that the defendants were dismissed with a favorable order for their encouragement, being assured by some of the Council, that his Majesty did not intend to impose the ceremonies of the Church of England upon us, for that it was considered, that it was the freedom from such things that made people come over to us." [2]

There were subsequent complaints from two classes of persons, — those who had adverse territorial claims, and those who had experienced the discipline of the Colony. Mason was particularly active, insomuch that Winthrop appears to have been resigned to the providence of God, which, in 1635, "in mercy, taking him away," terminated his efforts to overthrow the government.[3]

In February, 1633–34, on the understanding of the transportation of great numbers to New England, among them "divers persons known to be ill affected, discontented not only with civil, but ecclesiastical government here, whereby such confusion and distraction is already grown there, especially in point of religion, as, beside the ruin of the said plantation, cannot but highly tend to the scandal both of Church and State here," there was an order of the King in Council to stay divers ships then in the Thames, ready to set sail, with an order that the masters and freighters should attend the Council, and a

[1] Winthrop's Hist., vol. i. p. 100. [2] Ib., p. 103. [3] Ib., p. 187.

further order, "that Mr. Cradock, a chief adventurer in that plantation, now present before the board, should cause the letters patent for the plantation to be brought before this board."[1]

The ships were permitted to sail, on representations respecting the commercial interests which would be affected by their detention; and it would seem from what followed, that Cradock answered, that the charter was in the hands of Winthrop.

Laud became Archbishop of Canterbury in 1633; and his influence may perhaps be traced in this action of the Privy Council. Winthrop attributes it to "the archbishops and others of the Council;" and supposes that the intention was "to call in our patent."[2]

Shortly afterwards, on the 28th of April, 1634, a commission for regulating plantations, was issued to the Archbishop of Canterbury, the Lord Keeper, and others, most, if not all, of them members of the Privy Council, giving them, among other things, power of protection and government over the colonies planted and to be planted, "power to make laws, ordinances, and constitutions, concerning either the *State public* of the said colonies, or utility of private persons, and their lands, goods," &c.; "and for *relief* and *support of the clergy;*" "and for *consigning of convenient maintenance unto them by tithes*," &c.; power to inflict punishment on offenders by imprisonment and other restraints, or by loss of life, or members; power to hear and determine all complaints, whether against the whole colonies, or any governor, or officer. And then comes a clause, the intent of which may readily be discovered from what followed.

"And we do, furthermore, give unto you, or any five or more of you, letters patents, and other writings whatsoever, of us or of our royal predecessors granted, for or concerning the planting of any colonies, in any countries, provinces, islands, or territories whatsoever, beyond the seas; and if, *upon view thereof*, the same shall appear to you, or any five or more of you, to have been surreptitiously and unduly obtained, or *that any privileges or liberties therein granted, be hurtful to us, our Crown or*

[1] Hutch. Hist., vol. i. p. 33. From the order in which these proceedings are stated in Hubbard and Hutchinson, it would appear, that the King's expression of satisfaction was at the close of this hearing in 1633; but the dates in Winthrop's History show that to have been the year previous. Hubbard's dates in regard to these matters are not trustworthy.

[2] Winthrop, vol. i. p. 135.

prerogative royal, or to any foreign princes, to cause the same, according to the laws and customs of our realm of England, to be revoked; and to do all other things which shall be necessary, for the wholesome government and protection of the said colonies and our people therein abiding."[1]

It appears from a recital in a subsequent order, made in 1638, that the Commissioners, in 1634 or 1635, gave an order "to Mr. Cradock, a member of that plantation, to cause the grant or letters patent of that plantation (alleged by him to be there remaining in the hands of Mr. Winthrop) to be sent over hither."

In pursuance of the project for a general governor for the whole of New England, Gorges was directed to confer with the Council at Plymouth, to resolve whether they would resign their patent; and in April, 1635, the Duke of Lenox and others of that company, supposed to be acting in Gorges' interest, presented to the Lords of the Council[2] a petition, proposing to surrender; but praying, among other things, that the patent for the plantation of the Massachusetts Bay might be revoked.

Under the direction of the Commissioners, Sir John Banks, the Attorney-General, brought a *quo warranto* to enforce a forfeiture, in 1635. The process seems to have been founded upon an assumption, that the company had no rights whatever. There were fourteen allegations of usurpation; denying the defendants' claim of title to land, their claims to be a corporation, and to have the sole government of the country, &c.; and alleging that they made laws and statutes against the laws of England. There was no allegation that they had unlawfully established the government within the colony; but among the usurpations set forth was, —

"to keep a constant council in England of men of their own company and choosing, and to name, choose, and swear certain persons to be of that council; and to keep one council, ever resident in New England, chosen out of themselves, and to name, choose, and swear whom they please to be of that council."

Also, to have several common seals.[3] There was no service in the Colony;[4] but service was made upon several of the grantees

[1] Hutch. Hist. (App.) vol. i. p. 502.

[2] The Commissioners for Foreign Plantations are often so called, and there is danger of confusion, unless care is taken to distinguish their acts from those of the Privy Council.

[3] Hutch. Coll. Papers, p. 101.

[4] Hutch. Hist., vol. i. p. 86.

who were in England, each of whom, except Cradock, pleaded severally that he never usurped any of said liberties, and disclaimed. Against them, there was judgment that they should not for the future intermeddle with any of said franchises, but should be for ever excluded from the use of the same. Cradock appeared, and then made default; upon which there was judgment that he should be convicted of the usurpation charged, and that the liberties, privileges, and franchises should be taken and seized into the King's hand. The process was pending about two years, and there was judgment of outlawry against the rest of the patentees.[1] But this judgment availed nothing. Jones and Winnington, attorney and solicitor general, in 1678, concurred in an opinion, "that neither the *quo warranto* was so brought, nor the judgment thereupon so given, as could cause a dissolution of the charter."[2] The particular reasons were not stated. But we may well suppose the reason to have been, that there was no service on the corporation, nor on any of the members in Massachusetts, nor any legal outlawry as against them, and judgment of seizure was rendered against Cradock only. The reason for this probably was, that the process of the Court of King's Bench did not run into the Colony, because the Court had no jurisdiction there; and there could, of course, be no legal service there.

April 4th, 1638, the Lords Commissioners, taking into consideration that complaints grow more frequent "for want of a settled and orderly government in those parts;" and, calling to mind their former order to Mr. Cradock, about two or three years since, to cause the patent to be sent over; and, being informed by the attorney-general that judgment had been entered in the *quo warranto*, ordered that the clerk of the council, attendant upon them, should, in a letter from himself to Mr. Winthrop, convey their order; in which, "in his Majesty's name, and according to his express will and pleasure," as they said, they strictly required and enjoined him, or any other who had the custody, that they fail not to transmit the patent by the return of the ship; —

"it being resolved, that, in case of any further neglect or contempt by them showed therein, their Lordships will cause a strict course to be

[1] Hutch. Coll. Papers, p. 103. [2] Chalmers's Annals, vol. i. pp. 405, 439.

taken against them, and will move his Majesty to reassume into his hands the whole plantation."[1]

The General Court replied, that they were much grieved that their Lordships should call in the patent, there being no cause known to them, and no delinquency or fault of theirs expressed in the order; asking to know what was laid to their charge, and to have time to answer; assuring their Lordships that they were never called to answer the *quo warranto;* and if they had been, they doubted not that they should have put in a sufficient plea; and representing that, if the patent should be taken from them, they should be looked on as "runnigadoes" and outlaws, enforced to remove to some other place, or to return to their native country, either of which would put them to unsupportable extremities; and that (among other evils enumerated) the common people would conceive, that his Majesty had cast them off, and that they were freed from their allegiance, and thereupon would "be ready to confederate themselves under a new government, for their necessary safety and subsistence, which will be of dangerous example to other plantations, and perilous to ourselves of incurring his Majesty's displeasure."[2]

These repeated calls for the patent were in fact demands for its surrender, and they so understood.

Hutchinson says, "It was never known what reception this answer met with. It is certain that no further demand was made."[3] But he is mistaken.

It appears from Winthrop's History, vol. i. p. 298, that in 1639 — the precise date is not given —

"The Governor received letters from Mr. Cradock, and in them another order from the Lords Commissioners, to this effect; that, whereas they had received our petition upon their former order, &c., by which they perceived, that we were taken with some jealousies and fears of their intentions, &c., they did accept of our answer, and did now declare their

[1] Hutch. Coll. Papers, vol. i. p. 105. Hutchinson appends to a copy of the order this note: "Whether the intent of this order was, that the patent should be sent over, that the government of the colony might be under a corporation in England according to the true intent of the patent, or whether it was that the patent might be surrendered, is uncertain." But the *quo warranto* might have solved that doubt.

[2] Hutch. Hist. App., vol. i. p. 507; Winthrop, vol. i. p. 269.

[3] Hutch. Hist., vol. i. p. 88.

intentions to be only to regulate all plantations to be subordinate to their said Commission; and that they meant to continue our liberties, &c.; and therefore did now again peremptorily require the Governor to send them our patent by the first ship; and that, in the mean time, they did give us, by that order, full power to go on in the government of the people, until we had a new patent sent us; and withal they added threats of further course to be taken with us, if we failed!"

The next paragraph of the History is a curiosity, and I cannot resist the temptation to copy it in full. It shows why Hutchinson never heard of the reception, and the further demand: —

"This order being imparted to the next General Court, some advised to return answer to it. Others thought fitter to make no answer at all; because, being sent in a private letter, and not delivered by a certain messenger, as the former order was, they could not proceed upon it, because they could not have any proof that it was delivered to the Governor; and order was taken, that Mr. Cradock's agent, who delivered the letter to the Governor, &c., should, in his letters to his master, make no mention of the letters he delivered to the Governor, seeing that his master had not laid any charge upon him to that end."

The Lords Commissioners frankly admit their object, in this last order. They intended to bring all the plantations into subjection under their commission. The charter stood in their way. They called for it, and it did not come. Process to enforce a forfeiture of it had failed. There was a very good reason for this thrice-repeated demand by the Commissioners. Their commission purported to give it to them, with authority to revoke it, if, upon view of it, they found any thing hurtful to the King, his crown, or prerogative royal. The possession of it was thus made necessary to a revocation by the Commissioners. A view of a copy was not sufficient. No reason is apparent why this might not have been made otherwise. Perhaps it would have been, if there had been apprehension of difficulty in obtaining possession. But so it stood. Therefore the repeated attempts to obtain a surrender, with the threats if it was not forthcoming. It was important to exhibit a semblance of a legal revocation. There were too many complaints of the exercise of arbitrary power in England, to render it expedient to add others in relation to the colonies.

We have seen how the General Court disposed of the last

demand; and the King and Laud soon found other matters to occupy their attention.

Now in all these proceedings, the character of which I have stated in detail, I find no trace of an allegation, that "the true intent of the patent" was, that the government of the Colony should be under a corporation in England; and I submit, that the omission of such an allegation was a moral impossibility, if it had been so understood, especially as the transfer of the charter caused the main obstacle to the efforts of the Commissioners to revoke it.

The first appearance of an official objection which I have found, against the transfer, was in July, 1679, in the course of the difficulties in which Randolph was so conspicuous; "when," as Chalmers says, "the King wrote to the General Court, and required that other agents should be sent over, properly instructed; giving as a reason, which struck at the foundation of its power, that, since the charter by its frame was originally to have been executed within the kingdom, otherwise than by deputy, it is not possible to establish perfect settlement till those things are better understood."[1] This objection is among the articles of high crimes and misdemeanors presented by Randolph to the Committee of the Council, in 1682.[2] But it finds no place in the process in Chancery, in 1684, in which a decree was entered, that the charter be vacated, and cancelled.[3]

Chalmers, in another place, states, that the Attorney-General, Sawyer, gave it as his official opinion, "that the patent having created the grantees *and their assigns* a body corporate, they might transfer their charter and act in New England." The reason thus stated, is certainly not satisfactory. Chalmers adds, that "the two Chief Justices, Rainsford and North, fell into a similar mistake, by supposing that the corporate powers were to have been originally executed in New England,"[4] — an opinion which I have endeavored to sustain, by the terms of the charter, before I was aware of the high authority by which it was supported.

Usage is permitted to give a construction to an ancient charter or deed, where there is an ambiguity. Here was a use of the powers of government under the charter, — holding

[1] Chalmers's Annals, vol. i. p. 408.
[2] Ib., p. 462.
[3] Mass. Hist. Coll. 4th Series, vol. ii. p. 246.
[4] Chalmers, p. 173.

General Courts, and transacting all the business of the corporation within the Colony, which, if unlawful, rendered all the acts done under it during the time legally invalid, — with no objection on the part of the Crown in that particular, although other objections were made that the corporation had transcended its powers.

If this is not strictly a "usage" within the general rule, it is a contemporaneous construction by all parties, which is as strong, and even stronger, evidence than usage, to give the true interpretation of an instrument. When we add to this the fact, that in two processes to enforce the forfeiture of the charter, there is an entire omission of any allegation that wrong had been done in this respect, the evidence is sufficient to overcome any, even a very grave, ambiguity. But the fact, that there is here no ambiguity, explains the absence of all objections.

I am referred to "A copy of the docquet of the grant to Sir Henry Rosewell and others, taken out of the Privy-seal-office, at Whitehall," authorizing the draft of the charter; to show that it was the intention of the Crown or Council that the corporation should have its residence in England. It runs thus: —

"A grant and confirmation unto Sir Henry Rosewell, his partners, and their associates, to their heirs and assigns for ever, of a part of America, called New-England, granted unto him by a charter from divers noblemen and others, to whom the same was granted by the late king James, with a tenure in socage, and reservation of one-third part of the gold and silver ore: Incorporating them by the name of the governor and company of the Massachusetts-Bay, in New-England, in America, with such other privileges, for electing governors and officers here in England for the said company; with such other privileges and immunities as were originally granted to the said noblemen and others, and are usually allowed to corporations here in England. His majesty's pleasure, signified by Sir Ralph Freemen, upon direction of the lord-keeper of the great-seal; subscribed by Mr. Attorney-general; procured by the lord viscount Dorchester; February, 1628. Memorandum. Their charter passed 4th March following."[1]

I will admit that this is explicit enough to show that there was an intention when that minute was made, that the corporation should have a local habitation in England.

But I remark first, that by the plainest rules of evidence, this memorandum of the proceedings of the Council, prior to the

[1] Chalmers's Annals, vol. i. p. 147.

grant of the charter, cannot be admitted as evidence to control or vary the provisions of this instrument, as actually drawn up, formally executed, with the great seal annexed, and made matter of record; or to show the intention at the time of the final execution. In the absence of all ambiguity, the intention is to be derived only from the instrument itself.

My next remark is, that this "docquet," taken in connection with the charter itself, and other admitted facts, furnishes most plenary proof that the intention thus appearing, was in fact changed when the charter was afterwards drawn and authenticated. There would be no need of another "docquet" to show this, as the charter itself would and did show it.

The palpable difference between the terms of this memorandum and the charter itself, in the omission of an express provision in the charter assigning a residence in England to the corporation, can be accounted for only on a change of intention upon that point. It was not a matter which could have slipped out accidentally, and the omission have escaped the scrutiny to which the charter must have been subjected after it was prepared, and before it passed the great seal.

Further, the docquet shows an intention at that time, to grant such other privileges and immunities as were originally granted to the said noblemen and others (the Council at Plymouth), and are usually allowed to corporations in England. Here again, the great difference between the charter itself, and the intention shown by the minutes, is palpable evidence of a change of intention in this respect, also. It is sufficient to specify the difference in two or three particulars.

The Council consisted of forty members, each of whom were to be presented to the Lord Chancellor, or the Lord High Treasurer, or the Lord Chamberlain of the Household, to take his oath. Power was given to the President, deputy, or any two councillors, to administer the oaths of allegiance and supremacy to all persons who should go to the Colony of New England; and it was made *lawful* for them to minister oaths as well to persons employed by them, for the faithful performance of their service, as to other persons, for the clearing of the truth; but there was no clause requiring officers other than those who were councillors to take any oath of office; and their laws, as we

have seen, were to be as near as conveniently might be to those of England. The difference between the Council at Plymouth, and the Governor and Company of Massachusetts Bay, was substantially between an aristocratic corporation, composed of forty noblemen and gentlemen, which was to exercise its powers at a specified place in England, and make laws like the laws of England, as near as conveniently might be, and which might or might not administer oaths to persons in its employment; and a democratic corporation of an indefinite number, which was to hold General Courts, and might enact such laws as should be found expedient, so they were not contrary to the laws of the realm; which was required to administer oaths to all the officers, in a particular mode, for the faithful discharge of their duties; and which was not restricted as to place, so that it might set up its government either in England or on the Plantation, as it should see fit. Assuredly the docquet did not govern the provisions of the charter.

After setting out the copy of the docquet, Chalmers proceeds, —

"In the same papers, bundle 5, page 322, there is a sketch, drawn by Mr. Blathwayt, stating 'the clauses in the charter, shewing, that it was intended thereby that the corporation should be resident in England.' And, indeed, the whole tenor of the patent, as well as the subsequent conduct of the corporation, evinces the truth of that important fact. But the following extract of an agreement, entered into at Cambridge, the 26th of August, 1629, between Saltonstall, Dudley, Winthrop, and other chief leaders of Massachusetts, demonstrates that truth. From a collection of papers, made by Mr. Hutchinson, relative to the history of Massachusetts, p. 25–6: —

"'We sincerely promise, to embark for the said plantation, by the first of March next, to the end to pass the seas (under God's protection), to inhabit and continue in New England. Provided always, that, before the last of September next, the whole government, together with the patent for the said plantation, be first, by an order of Court, legally transferred and established, to remain with us and others, which shall inhabit upon the said plantation.'"

Blathwayt was contemporary with Randolph. It seems, therefore, that this specification of clauses was made about the time Randolph was alleging that the government was unlawfully

established in Massachusetts; that is to say, some forty or fifty years after its establishment there. What these clauses were, I am unable to say. Chalmers does not state them, and, unfortunately, I do not find them in the charter.

But the most wonderful evidence of an intention that the corporation should be resident in England, is that derived by Chalmers from the agreement of Winthrop and others, which he copies, and which he says demonstrates its truth. His conclusion is to be accounted for, perhaps, by the supposition that he understood the words, "by an order of Court," in this agreement, to refer to the Court of his Majesty, at Whitehall; whereas, the contracting parties had reference to an order of the General Court of the Company, such as was passed three days afterwards.

Chalmers concedes that this docquet "evinces, that what was so strongly asserted, during the reign of Charles II., to prove that the charter was surreptitiously obtained, is unjust."

I have considered this proposition at length; not only because the transfer has sometimes been regarded as sharp practice on the part of the grantees, but for the reason, already suggested, that, if the transfer was unlawful, the whole legislation of the company afterwards was unwarranted. The company had power to make laws for, and to govern, a Colony. But their authority to do this was as a corporation; and a corporation, having a fixed locality, cannot hold corporate meetings, make by-laws, elect officers, and do other acts necessary to be done by the corporation itself, except in the place where it has its legal residence. In the absence of prohibition or limitation, it may hold property, may trade, and perform other acts which can be done by agents, elsewhere.

3. The charter gave ample powers of legislation and of government for the Plantation, or Colony, including power to legislate on religious subjects, in the manner in which the grantees and their associates claimed and exercised the legislative power.

It granted power to the General Courts —

"from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this our realm of England, as

well for settling the forms and ceremonies of government and magistracy, fit and necessary for the said plantation, and the inhabitants there, and for naming and settling all sorts of officers, both superior and inferior, which they shall find needful for that government and plantation, and the distinguishing and setting forth of the several duties, powers, and limits of every such office and place, and the forms of such oaths warrantable by the laws and statutes of this our realm of England as shall be respectively ministered unto them, for the execution of the said several offices and places; as also for the disposing and ordering of the elections of such of the said officers as shall be annual, and of such others as shall be to succeed in case of death or removal, and ministering the said oaths to the newly elected officers, and for impositions of lawful fines, mulcts, imprisonment, or other lawful correction, according to the course of other corporations in this our realm of England; and for the directing, ruling, and disposing of all other matters and things, whereby our said people, inhabitants there, may be so religiously, peaceably, and civilly governed, as their good life and orderly conversation may win and incite the natives of the country to the knowledge and obedience of the only true God and Saviour of mankind, and the Christian faith, which, in our royal intention and the adventurer's free profession, is the principal end of this plantation."

"Willing, commanding, and requiring, ordaining and appointing," that all such orders, laws, statutes, and ordinances, instructions and directions, as should be so made by the Governor, deputy governor, assistants, and freemen, and published in writing under their common seal, should be carefully and duly observed, kept, performed, and put in execution; the letters patent to be to all officers a sufficient warrant therefor, against the King himself, and his heirs and successors.

But there was a restriction upon their legislation, religious as well as civil. They were to make no laws contrary to the laws of the realm; and the question arises, What was the character and what the extent of this restraint?

We may safely conclude that the meaning of the provision is not that they are to make no laws different from the common law of England, for much of that law was entirely inapplicable to their condition, so that they were under the necessity of making different laws. Laws different from, contrary to, the laws of feudal tenure could not come within the prohibition. The same may be said of laws relating to the peerage, and divers other matters of more common concern.

So we may be assured that it was not a prohibition to make laws different from the statutes of England, for it was known that it was to escape from some of those laws that they emigrated. If they could make no law which provided for a different form of worship than that which was established in England, — if they must establish that with all its concomitants, they would hardly have crossed the Atlantic for the privilege of voluntarily subjugating themselves by their own acts, to the pains and penalties, and violation of conscience, to which the acts of others would have subjected them if they had remained. Moreover, they had no bishops, — could not consecrate any, — and no one proposed to do that for them when the charter was granted. Laud would doubtless have been pleased to do them that favor three or four years afterwards; but their right of legislation, or the restraints upon it, or the removal of restraints, did not depend upon that.

The true construction of the clause is, that they shall make no laws contrary to, — antagonistic to, — in contravention of, the laws of the realm which extended or should extend over them, as inhabitants of the Colony, and which were to be their paramount law.

We are thus brought to the question, whether any, and what laws of the realm were in force in the Colony at the time of the charter and emigration. Happily we can settle this question by authority. It is agreed that the law of the conqueror does not extend over the conquered country, until the conqueror pleases to put it in force there. And although we now hold that the title of the Crown to the greater portion of this country was by right of discovery, it was held by the Courts of England, long subsequent to the reign of Charles I., to be a title by conquest. Chief-Justice Holt, in the Court of King's Bench, in the 4th of Anne, said, "The laws of England do not extend to Virginia! being a conquered country, their law is what the King pleases."[1] And Blackstone, lecturing as late as 1756, says, "Our American plantations are principally of this latter sort [conquered or ceded countries], being obtained in the last century, either by right of conquest, and driving out the natives, (with what natural justice I shall not at present inquire), or by

[1] Salkeld's Reports, vol. i. p. 666.

treaties. And, therefore, the common law of England, as such, has no allowance or authority there." He adds, that they are "not bound by any acts of Parliament, unless particularly named."[1]

Mr. Justice Story, it is true, says of the doctrine of Mr. Justice Blackstone, "It is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters, under which all these colonies were settled, with a single exception [Pennsylvania], there is, as has been already seen, an express declaration, that all subjects and their children inhabiting therein, shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof; and that the laws of England, so far as they are applicable, shall be in force there; and no laws shall be made, which are repugnant to, but as near as may be conveniently, shall conform to the laws of England."[2]

But here is a great mistake, so far as it relates to Massachusetts. There is no provision, either in the Colony or in the Province charter, that the laws of England, so far as they are applicable, shall be in force there; nor that the laws of the Colony or Province shall, as near as conveniently may be, conform to the laws of England.

He says farther, "Now, this declaration, even if the Crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the Crown."

And in the next section, "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance; and that our ancestors brought hither with them, upon their emigration, all of it which was applicable to their situation."

[1] Blackstone's Com., vol. i. p. 108.

[2] Story's Com. on the Constitution, § 156. — The principle that the laws of the discoverer extend over the discovered country, without any action for that purpose, if sound to any extent, must be subject to grave limitations. One of the reasons given why the laws of the conqueror do not extend over the conquered country is, "because, for a time, there must want officers, without which our laws can have no force." (Salkeld's Reports, vol. i. p. 412.) That would certainly apply with its full force to the discoveries in America. If the colonists had found the common law here, or had brought it with them, it must have been packed away, until the machinery was provided to put it in operation. Another reason, viz., that the laws of the conqueror may not be suited to the state and condition of the conquered, is applicable, to a great extent, in the case of settlement, under title derived from discovery.

This allegation may be found repeated again and again, — in judicial decisions, even, since the time of the Province charter, — but it must be taken with some grains of allowance. Applied to the early emigrants and their proceedings, it cannot be supported. As to them, there is better and more satisfactory evidence that they did not bring the common law with them as a part of their law, than can be derived from any inference respecting the general principle which would govern the case, either as an acquisition by conquest, purchase, or discovery.

James I. having the right to govern the country either directly or through a local government established by him, granted the charter of the Council at Plymouth, in the county of Devon, giving the grantees power to correct, punish, pardon, govern, and rule, the inabitants —

"according to such laws, orders, ordinances, directions, and instructions, as by the said Council aforesaid shall be established; and, in defect thereof, in cases of necessity, according to the good discretions of the said governors and officers respectively, as well in cases capital and criminal as civil, both marine and others; so always as the said statutes, ordinances, and proceedings, as near as conveniently may be agreeable to the laws, statutes, government, and policy of this our realm of England."

The Puritans claimed title to their lands under this charter, but not their corporate authority and privileges. Their charter gave them power to pass laws, without any provision for the introduction of the common law, and not even requiring that their laws and proceedings should be as near as conveniently might be to the laws of the realm; but providing that they should make none contrary to the laws of the realm. The grantees neither claimed nor recognized the common law as a part of the laws by which they were governed. There is nothing in their records, nor in their statutes, nor in their declarations, to show any recognition of it as their law. It neither regulated the rights of persons or things, nor did it furnish the rule of judicial decision. Where a discretionary power was vested in the magistrate, he consulted the common law with an inquiry how the case would be determined by that law, and it is quite probable that he usually adopted it, because it is said to be founded in right reason; and for reasons of a prudential character, it was desirable that their proceedings should be, in the language of the

charter of the Council at Plymouth, as near as conveniently might be, agreeable to the laws and policy of the realm. But the magistrate was not bound by it, being at perfect liberty, if he thought fit, to act on what he deemed a better opinion of his own.

The claim of the colonists, that the common law was a part of their birthright, and formed a part of their laws, came in at a later period, after their controversies with the Crown had assumed grave proportions. It was interposed as a shield against arbitrary power, and was doubtless founded upon the clause in the charter securing to them the privileges and immunities of natural-born subjects, perhaps also upon a general principle to that effect in the absence of special provisions. It may be a matter of curious inquiry to ascertain the precise circumstances of its introduction and reception.

The Puritans claimed the right to pass their own laws, with the Bible, and not the common law, as their fundamental law.

This is conclusively shown by the answer of the General Court, in 1646, to the petition of Dr. Child and others, complaining, among other things, that they could not, according to their judgments, discern a settled form of government according to the laws of England. To this complaint the answer is, —

"For our government itself, it is framed according to our charter and the fundamental and common laws of England, and carried on according to the same (taking the words of eternal truth and righteousness along with them, as that rule by which all kingdoms and jurisdictions must render account of every act and administration, in the last day), with as bare allowance for the disproportion between such an ancient, populous, wealthy kingdom, and so poor an infant thin colony, as common reason can afford. And because this will better appear by comparing particulars, we shall draw them into a parallel. In the one column we will set down the fundamental and common laws and customs of England, beginning with Magna Charta, and so go on to such others as we had occasion to make use of, or may at present suit with our small beginnings. In the other column, we will set down the sum of such laws and customs as are in force and use in this jurisdiction, showing withal (where occasion serves) how they are warranted by our charter. As for those positive laws or statutes of England which have been from time to time established upon the basis of the common law, as they have been ordained upon occasions, so they have been alterable still upon like occasion, without hazarding or weakening the foundation, as the experience of many hundred years hath

given proof of. Therefore there is no necessity that our own positive laws (which are not fundamental) should be framed after the pattern of those of England; for there may be such different respects, as in one place may require alteration, and in the other not." [1]

Then follows, in lengthened columns, divers provisions of Magna Charta and the common law, on the one side, and the corresponding "Fundamentals of Massachusetts," on the other, showing their similarity.

To the same effect is the statement of Edward Winslow, in his "New England's Salamander Discovered," published in London, 1647, in answer to Dr. Child's "New England's Jonas cast up at London:" —

"As for the law of England, I honor it, and ever did, and yet know well that it was never intended for New England, neither by the Parliament, nor yet in the letters patents, we have for the exercise of government under the protection of this State; but all that is required of us in the making of our laws and ordinances, offices and officers, is to go as near the laws of England as may be: [2] which we punctually follow, so near as we can. . . .

"And however we follow the custom and practice of England so near as our condition will give way, yet as the garments of a grown man would rather oppress and stifle a child, if put upon him, than any way comfort or refresh him, being too heavy for him, so, have I often said, the laws of England, to take the body of them, are too unwieldy for our weak condition. Besides, there were some things supported by them which we came from thence to avoid; as the hierarchy, the cross in baptism, the holy days, the Book of Common Prayer," &c. . . .

"As for our trials between man and man, he knows we go by jury there as well as here. And in criminals and capitals we go by grand jury and petty jury. And where the death of any is sudden, violent, or uncertain, the crowner sits upon it by a quest, and returneth a verdict, &c., and all according to the commendable custom of England, whom we desire to follow. But their main objection is, that we have not penal laws exactly set down in all cases? 'Tis true, I confess, neither can they find any Commonwealth under heaven, or ever was, but some things were reserved to the discretion of the judges; and so it is with us, and no otherwise, our General Courts meeting together twice a year, at least, hitherto,

[1] Hutch. Coll. Papers, p. 199.

[2] Referring, it seems, to the charter of the Council at Plymouth, which granted to Bradford the charter of the Plymouth Colony.

for that very end, and so continuing so long as their occasions and the season will permit: and in case any misdemeanor befall where no penalty is set down, it is by solemn order left to the discretion of the bench, who, next to the Word of God, take the law of England for their precedent before all other whatsoever. And as I said before, if I would enter into particulars, I could here set down in a line parallel, as I received it,[1] in answer to the petition of Doctor Robert Child, &c., mentioned in their book, 'the fundamentals of the Massachusetts concurring with the privileges of Magna Charta and the common law of England at large.'"[2]

Chief-Justice Hutchinson, also, is a competent authority upon the point, that the first emigrants did not claim the common law as a part of their law, nor acknowledge it as having authority with them. In a charge to the grand jury, March term, 1767, he said, —

"I don't know a nation in the world, that makes the distinction between murther and manslaughter, which the English do. It was not made in this country before the charter [Province charter]; for our forefathers founded their laws upon the law of Moses, which makes no such distinction."

In another charge, March term, 1768, while he repeats the statement — at that time, and since, quite common — respecting the introduction of the common law, he is even more explicit in his declaration, that the first emigrants did not consider themselves bound by it, and did not regard it as their law.

"Our ancestors, gentlemen, when they came over to this country, brought with them the common law of our mother country (which is with great propriety so called); and although their first charter bound them down to make no laws contrary to the law of England, yet, from the situation they were then in, and from their peculiar circumstances, they then apprehended they had a right to adopt the judicial laws of Moses which were given to the Israelites of old. They at that time considered, not how crimes affected the peace and harmony of society, but almost always adapted their punishment to the real guilt of the criminal. . . . .

"Upon a judgment given against the old charter, the people could never obtain so great a boon, as they thought their old charter: since, you are sensible, they appointed all their officers, made all their laws, without any control from home. . . . . We stand, therefore, upon quite a different

[1] He was agent for Massachusetts at the time.

[2] See Mass. Hist. Coll. 3d Series, vol. ii. pp. 137–140.

footing from our forefathers, and the principle of our laws is very variant from that which governed them under the old charter. There were several attempts made, since our present charter, to enact laws upon the old charter principles; but they all failed, and the laws were disallowed in Great Britain."

"The principle of law which now governs us, is to punish crimes, only as they affect society."[1]

But all this is not necessary to the support of my position, that the common law, and the statute law of England in amendment of the common law, were not the laws of the realm, contrary to which the colonists were to make no laws; for their power to pass statutes contrary to both, has been exercised without question ever since the common law has been recognized as in force in the Colony and in the Province; subject, after the Province charter, to the negative of the Crown, as provided in that instrument.

Chalmers interprets the restraint,—"You shall make no ordinances inconsistent with the connection between the territory and the country of which it is a member;" and says further, "so a colony may adopt new customs; may abrogate that part of the common law which is unsuitable to its new situation; may repeal the statute law wherein it is inapplicable to its condition. All it may change, except only the principles of its coalition with the State, or the special regulations of the supreme power, or great body-politic of the empire with regard to it." — With this exposition of the clause of restraint, it would be quite unimportant whether or not the common and statute law of the realm extended over the Colony. Any law of the Colony inconsistent with either would abrogate or repeal it, without any violation of the clause of restraint.[2]

It may be said that the King was restrained by Magna Charta and the Petition of Right, as well in his colonial possessions, as in England itself.

The colonists were subject to the lawful legislation of the mother country; and so far as that legislation was extended over them by the force of the legislation itself, or by the legiti-

[1] Quincy's Mass. Reports, 1761–1772. Published 1865. Pages 235, 258–260.

[2] Chalmers's Annals, vol. i. p. 140.

mate power of the Crown, so far they could make no laws, civil or religious, in contravention of it. The navigation acts extended over them; and their legislation, contrary to those acts, was one of the allegations in the *scire facias*, on which the charter was vacated and cancelled. But it was held, that the *habeas corpus* act, passed 31st, Charles II., did not extend to the colonies, because they were not named in it.

After the clause authorizing legislation, follows a provision that the Governor and company "and all the chief commanders, captains, governors, and other officers and ministers" as should by said orders, laws, &c., from time to time be employed in the government of the said inhabitants and plantation, or in the way by sea thither or from thence, according to the nature and limits of their offices, —

"shall, from time to time, hereafter for ever," — "have full and absolute power and authority to correct, punish, pardon, govern, and rule all such the subjects of us, our heirs and successors, as shall from time to time adventure themselves in any voyage thither or from thence, or that shall at any time hereafter inhabit within the precincts and parts of New England aforesaid, according to the orders, laws, ordinances, instructions, and directions aforesaid, not being repugnant to the laws and statutes of our realm of England as aforesaid."

The power to pardon is conclusive evidence of a grant of political government, no such power being known in an ordinary corporation.

It hardly seems to be within the power of language, more completely to negative the idea that the charter constituted a corporation mainly for the purpose of trade and traffic; or, more clearly, to grant powers of legislation and government, whereby the inhabitants of the Colony might be "religiously, peaceably, and civilly governed."

Whatever Charles II. may have said about general liberty of conscience, of which he personally made a very large exhibition in some particulars, Charles I. and his ministers could not but form a reasonable judgment respecting the mode and manner in which the Colony would be religiously, as well as civilly, governed under his charter, whether he ever read it or not.

4. The charter authorized the exclusion of all persons whom the grantees and their associates should see fit to exclude from

settlement in the Colony; and the exclusion of those already settled, by banishment as a punishment for offences.

They were the owners of the soil; and, in the absence of conditions or limitations, the owner of such a title has an exclusive right of possession. They were the grantees of a charter of incorporation; and such grantees, unless there is some special provision or circumstance controlling them, may determine who shall be admitted to a participation in their corporate rights.

There was, here, nothing of condition or limitation in relation to their title to the territory; and their right to judge whom they would admit did not depend upon the general principle merely, but was express. They were to admit such persons as they thought fit, to be freemen.

Persons who came on their invitation, or through inducements held out by them, or with their consent in any way, could not in justice be sent away arbitrarily, or for any fancied dislike. In that respect they stood like other governments; and the proprietorship of the soil, which they held out for occupation and settlement, would not give them the right of removal as if such parties were trespassers. Coming by consent, and obeying the laws, they would be entitled to protection. But aside from considerations of this kind, the power of exclusion, on fair notice not to come, could not be made more perfect.

The King desired to limit their power of *admission*, so that persons especially obnoxious or dangerous to him, should not be harbored there, and he retained the power of exclusion to himself, by an express provision, which, however, was so limited that he could exclude only persons who were designated by name.

It has been supposed that the provision, that all subjects of the King and his successors who should go to, and inhabit within, the lands granted, should have and enjoy all liberties and immunities of free natural subjects, might be regarded as evidence of a restriction upon the right of exclusion by the grantees. But this cannot be maintained, for two reasons. — First, because this can be applied only to persons rightfully there, or going to, or returning from, the territory. It could not, of course, apply to any one whom the King had excluded by name from going there; and if there be this implied limitation upon it, in relation to persons excluded by the King, the same limitation must be

implied in regard to persons excluded by the colonial government, which, as we have just seen, aside from this provision, had, from its title, as perfect a power of exclusion as the King had by the clause for that purpose in his favor. It would be a gross violation of sound rules of construction, to say that this clause was a clause of protection to persons who had no lands, and no interest in the charter, and who were, moreover, prohibited from coming and remaining there, by the owners of the land and the grantees of the charter; for if it might so apply to *any*, it would apply to *all* who should go, and the right to the land and the corporate privileges would soon be rendered a nullity. — Second, this clause, rightly understood, is a limitation upon the royal authority, to the extent of its operation, and not upon the authority of the colonists. The King will not put persons out of the pale of English subjects, — deprive them of the privileges of English subjects, — because they go and inhabit there. They shall be Englishmen still. Let us see this a little more clearly, by a citation of the provision itself.

"And, further, our will and pleasure is, and we do hereby for us, our heirs and successors, ordain and declare, and grant to the said governor and company, and their successors, that all and every the subjects of us, our heirs or successors, which shall go to and inhabit within the said lands and premises hereby mentioned to be granted. and every of their children which shall happen to be born there, or on the seas in going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of us, our heirs or successors, to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the realm of England."

You perceive that it is confined to *subjects*, and does not include strangers. It provides that these subjects, and their children born there or on the passage to and from, shall have the liberties and immunities of free natural subjects within any of the King's dominions, as if they were born within the realm. What were the liberties and immunities of such subjects? Certainly, not to go and inhabit the crown lands against the will of the King, or any lands which the King had granted, against the will of the persons to whom the grant had been made. Certainly, not to intrude themselves into any corporate rights which had been granted to others. Persons who should go and inhabit lawfully,

should have the general rights of Englishmen as secured by "Magna Charta," and the customs of the realm. But this did not exempt them from any legislation, otherwise lawful, under the charter.

5. The charter authorized the creation and erection of courts of judicature to hear, try, and determine causes, and to render final judgments and cause execution to be done, without any appeal to the courts of England, or any supervisory power of such courts.

To the express provision authorizing the establishment of all manner of wholesome laws, statutes, and ordinances, for settling the forms and ceremonies of government and magistracy, fit and necessary for the Plantation, — for the settling of all sorts of officers which they shall find needful for that government and Plantation, and for setting forth their several duties and powers, — and also to that giving full and absolute power and authority to correct, punish, pardon, govern, and rule, I have already referred.

There is no provision in the charter for any original jurisdiction of the courts of England, over the Colony, nor for an appeal, in any shape, to those courts. And there was no custom of the realm, no common law, which gave any such jurisdiction. If it were supposed that the King had power to confer jurisdiction upon the courts of England, original jurisdiction in those courts would have been a denial of justice. And an appellate jurisdiction, afterwards deemed oppressive in the days of the Province, would, in the infancy of the settlement, have been next to impossible. The fact that there was no service of the writ, *quo warranto*, in 1635, within the Colony, shows very clearly that it was understood that process did not run there.

The Lords Commissioners seem to have been careful not to attempt a regular service of their orders within the Colony. They were sent in letters from Mr. Meautis, their clerk, and from Mr. Cradock, to the Governor.

Hutchinson, in stating the proceedings in 1691, when the grant of a Province charter was under consideration, remarks, —

"By the old charter, it was said, they had power to imprison or inflict punishment, in criminal cases, according to the course of corporations in England, but that, unless capital cases be expressly mentioned, the power

would not reach them; that no power was given to erect judicatories, or courts for probate of wills, or with admiralty jurisdiction, nor any power to constitute a house of deputies or representatives, nor to impose taxes on the inhabitants, nor to incorporate towns, colleges, schools, &c., which powers and privileges had been, notwithstanding, usurped."[1]

But this construction, limiting all the powers under the charter, "according to the course of corporations in England," is utterly unwarrantable. That expression occurs but once in the charter, and follows immediately after a provision in relation to elections. If it is not confined to "fines, mulcts," &c., in relation to that subject, no reasonable construction can extend it to other provisions which I have cited. It would be absolutely impossible to govern a colony in America, according to the course of corporations in England constituted for trading or even for municipal purposes.

Hutchinson inserts in a note the opinion of Mr. Hook, who was consulted by Hampden in relation to the Province charter, among other things, that the grantees under the old charter had "no power to keep a prerogative court, prove wills, &c.; nor to erect courts of judicature, especially chancery courts."[2] This is very astonishing, unless we suppose that Mr. Hook, in considering the express powers which should be inserted in the new charter, accepted the objections which had been made to the old, by Gardiner and others, without any critical examination. Certainly, the old charter was intended to be complete for its purposes. No addition was contemplated to be made, either by King or Parliament. How were the people to be civilly and peaceably governed, without courts? Was the power to punish and pardon to be exercised without any judgment of conviction? What is meant by the power granted to make laws, "as well for settling of the forms and ceremonies of government and *magistracy*, fit and necessary for the said plantation,"—"and for naming and settling of *all sorts of officers*, both superior and inferior, which they shall find needful for that government and plantation"? The idea of a colony to be settled and governed without courts would be preposterous.

It would seem, therefore, that the propositions which I have stated are fully sustained without any resort to the express pro-

[1] Hutch. Hist., vol. i. p. 415. [2] Ib., p. 111.

vision in the charter, which embodies a general principle of law now well understood and applied in cases of doubt, to deeds of private persons, that the charter should be construed, reputed, and adjudged in all cases most favorably for the benefit and behoof of the grantees.

If any thing were needed to fortify the foregoing positions, it may be found in the fact, that, in the process and proceedings in the latter part of the reign of Charles II. to enforce a forfeiture of the charter, or to annul it, there was no allegation of a usurpation of power in any of these particulars; nor any alleged grounds of forfeiture founded upon either of them.

The causes of forfeiture, as set forth in the Court of Chancery, were, that the Governor and company assuming on themselves, under color of their letters patent, power to assemble to make good and wholesome laws and ordinances, not repugnant to the laws of England, but respecting only their own private gain and profit, assumed the unlawful and unjust power to levy money of the subjects of the King, and, in prosecution of that power, made laws for levying poll taxes, and duties on merchandise and tonnage; that they had passed a law providing for a mint, and the coining of money; and another, requiring an oath of fidelity to the government of the Colony.[1]

Undoubtedly, the absence of other allegations of abuse of power under the charter is not conclusive evidence of a belief on the part of the crown lawyers, that there were none others which could be sustained; but there is no good reason why more should not have been enumerated, if it was supposed that others of a grave character existed, and a transfer of the charter and government, or an exclusion of his majesty's roystering subjects from inhabitancy, or any religious legislation whatever, if supposed to be unlawful, would hardly have been omitted.

I have no means at hand to determine with certainty, why this process was instituted in the Court of Chancery, which, ordinarily, has no jurisdiction of proceedings *quo warranto*, and

[1] The power to coin money being, at that time, not an ordinary legislative power, but one of the King's prerogatives, the value of unusual pieces to be ascertained by proclamation, it might well be held that the charter did not confer it. And some of the legislation of the Colony may have been contrary to the navigation acts of the realm. To that extent, the complaints seem to have been well founded; perhaps somewhat further.

relieves against, rather than enforces, forfeitures. In a "Brief Relation of the Plantation of New England," by an unknown author, written at London, in 1689, it is stated, —

"that, in the year 1683, a *quo warranto* was issued out against them," — that "the Governor and company appointed an attorney to appear and answer to the *quo warranto*, in the Court of King's Bench. The prosecutors not being able to make any thing of it there, a new suit was begun by a *scire facias* in the Court of Chancery." [1]

Chalmers says of the *quo warranto*, "Randolph's was the ominous hand which carried it across the Atlantic. And to give weight to the messenger who, in Massachusetts, had little in himself, and to the proceeding, which was equally obnoxious, a frigate was ordered to transport him thither." He says further, "After a variety of obstructions, arising from the distance, *the novelty*, and *real difficulty* of the business, a judgment was given for the King by the high Court of Chancery in Trinity term, 1684, against the Governor and company in Massachusetts, that their letters patents, and the enrolment thereof, be cancelled."

The validity of the proceedings was afterwards "questioned by very great authority." [2]

The reason why the prosecutors could not make any thing of it in the King's Bench may have been that suggested in relation to the former writ, that, as the process of the court did not run into the Colony, there could be no service there.[3] It may have been that the writ did not issue against "the Governor and company." The colonists instructed counsel to take that exception. But if that was the main objection, it might readily have been obviated by the issue of another writ. If so issued, however, it would have been an admission of the existence of the corporation, which was challenged by the allegations of usurpation in the process in 1635.

It may be conjectured that the *scire facias* was brought in Chancery on the ground, that chancery might annul the charter, though out of its jurisdiction, on the same principle that it now sometimes compels a man within its jurisdiction to give a

[1] Mass. Hist. Coll. 3d Series, vol. i. p. 96 [2] Annals, vol. i. pp. 414, 415.

[3] "The sheriff's" [of Middlesex, England] "principal objection why he did not return a summons was, the notice was given after the return was past. *He did also make it a question whether he could take notice of New England, being out of his bailiwick.*" — *Letter of Attorney-General Sawyer.* See Palfrey's Hist. New England, vol. iii. p. 391, *note*.

deed transferring a title to lands lying within another government. But the cases are not alike.

No judgment of forfeiture was entered, nor any decree ordering any person to bring in and surrender the charter, or to do any other act in relation to it. The court adjudged, that the letters patent, "and the enrolment thereof, be vacated, cancelled, and annihilated, and into the said court restored, there to be cancelled;" but there was no attempt to enforce the latter part of the decree.

The proceedings may have been instituted in that court, upon the ground of an ancient jurisdiction of the chancellor to repeal grants of the King, which had been issued improvidently. But the assumption to enter a decree, that a charter granting lands, and corporate powers, and powers of government, and which had existed more than half a century, should "be vacated, cancelled, and annihilated," on account of usurpations, which, in case of ordinary corporations, may be a subject for proceedings by writ of *quo warranto* in the King's Bench, — and especially to do this upon a writ issued to the sheriff of Middlesex, in England, under such circumstances that there could be neither service nor notice, — would be of itself a usurpation. And this seems to be its true character, whatever might be the reason alleged.

If the colonial government was exercising power inconsistent with the charter, or with colonial dependence, the true remedy would at this day appear to have been, not by process to enforce a forfeiture, or to vacate the charter, which, if effective, would leave the inhabitants without any legal government; but by an enforcement or amendment of the charter, in regard to its public powers and character, by the Crown, from which it was derived, or by an act of Parliament making the requisite provision for that purpose.

The better opinion may be, that meeting with technical difficulties in the court of law, resort was had to Chancery, *because of a better assurance of speedy success.*[1]

The proceeding appears to have been no more effective in its character, than might have been a judgment of seizure, in a process at law; and, in fact, little better than would have been an order of the King in Council, that the charter was forfeited, with a revocation of its powers. However, the decree an-

[1] See Palf. Hist., vol. iii. 391–394.

swered its purpose. The colonists were not in a situation to contest it.[1]

Certain differences between this charter and the charter of the Council established at Plymouth in the county of Devon, have already been considered.

It may be noticed farther, as fortifying the position, that the powers granted in the charter of Charles included a power of exclusion, that the Great Patent to the Council provided, expressly, that the territories granted should not be visited, frequented, or traded unto, by any other of the King's subjects, with a provision prohibiting all the King's subjects from visiting or trading there, unless it be with the license and consent of the Council, upon pain of the King's indignation, and imprisonment of their bodies during his pleasure, with forfeiture besides. And the King condescended and granted, that he would not grant any liberty or license to any person to sail, trade, or traffic there, without the good-will and liking of the Council.

The provisions of the charter of Charles were so comprehensive that there was no necessity for such express exclusions.

A comparison of the provisions of the charter, with the subsequent proceedings of the Puritans, relieves them from the charges which have been so persistently urged against them.

It has been said, that "the charter did not include any clause providing for the free exercise of religion, or the rights of conscience." But this is a mistake. It is true that there is not, in express terms, any such provision. It would have been most surprising, if the King had made proclamation of any such liberty, by a formal grant. But the power of legislation, which included the power to legislate on religious matters, was as plenary for that purpose, as an express grant would have been. The "letter from King Charles II. to Massachusetts," in 1662, asserts that "the principle and foundation of that charter was, and is, the freedom of liberty of conscience."[2] And a letter prepared for the royal signature, by the lords of the committee for plantations, in October, 1681, not only recites that the charter granted "such powers and authorities as were thought

[1] See the Exemplification of the judgment. Mass. Hist. Coll., 4th Series, vol. ii. p. 246.

[2] Hutch. Coll. Papers, vol. i. p. 378.

necessary for the better government of our subjects, at so remote a distance from this our kingdom;" but adds, "nothing was denied, which you then deemed requisite for the full enjoyment of your property, and the *liberty of your conscience*, so you would always contain yourselves within that duty which the bonds of inseparable allegiance bind you to."[1]

They did not come here to establish or provide for any general liberty of conscience. In his very full and complete exposition of this fact, the reverend and learned gentleman with whom I am associated, Dr. Ellis, stated that they placed a restraint — the restraint of the Bible — upon *their own* liberty of conscience. This depends upon the signification which we give to the term conscience, which, as you know, is sometimes used to designate the faculty by which we have ideas of right and wrong in reference to actions, without regard to, and perhaps in ignorance of, the precepts of the Bible, occasionally called natural conscience; and it is sometimes used to designate the same faculty, instructed in the Bible, receiving it as the word of God, by which to test right and wrong, incorporating its restraints into, and making them part of itself, — not unfrequently termed an educated or enlightened conscience. In the former signification, which is plainly the sense in which Dr. Ellis uses the word, the Puritans did not seek to establish liberty of conscience even for themselves.

The charter in giving power to make orders, laws, &c., for directing, ruling, and disposing of all other matters and things, by which the inhabitants might be religiously governed, clearly contemplated government in matters of religion; and government in matters of religion, in those days, meant any thing other than liberty for every man to do what his notion of right and wrong dictated in that matter. The grantees meant and understood it, as government according to the laws of the Bible. In the other sense of the term, conscience, that is, the faculty of distinguishing between right and wrong, instructed by the Bible, and according to its precepts, as they understood them, — liberty of conscience for themselves was precisely what they intended to secure. In other words, their great object was to secure for themselves and those who, with their principles, should associate

[1] Chalmers, vol. i. p. 444.

with them, the liberty to worship God according to the dictates of their own consciences, — enlightened by the Bible.

The key to their enterprise, as thus presented, unlocks the repository of their ends and aims, intents and purposes; and you have the explanation and the justification of their religious legislation.

They founded a civil State, upon a basis which should support the worship of God according to their conscientious convictions of duty; and an ecclesiastical State, combined with it, which should sustain, and be in harmony with, the civil government; excluding what was antagonistic to the welfare of either.

Some one may inquire, If such was the design of the Puritan Fathers in the establishment of their government here, why was it not more distinctly stated and proclaimed at the time, leaving no room for misconception afterwards? The ready answer is, that, if a public development of all their purposes had been made, there might have been danger of some measures to defeat their designs, and to extinguish their hopes. The King and his ministers must have known the general character of the enterprise. There was no necessity that there should be a public proclamation of their intentions beyond what was made. It is sufficient that there was no stratagem and no deception in the matter. Doubtless, as the enterprise proceeded, some measures were adopted, which were not originally contemplated.

Is it asked, How it is possible that the Puritan Fathers, who were not recluses, but many of them men of education, — men of great intelligence in their day, — men mixing with the world, — could entertain the idea of establishing a Commonwealth, where religion should outwardly be brought to a rigorous test of uniformity, when they themselves were non-conformists to the Church of England?

It may quite as well be asked, Why, with their deep religious convictions, they should have had any doubts of success? Theirs was a religious as well as a civil State. The Jewish government, which was their pattern so far as it might be applicable, existed for ages. The Papacy had, for centuries, claimed the implicit reception of its dogmas, and unhesitating obedience to its mandates. The Reformation denied the infallibility of the Church of Rome, and exposed its errors; but the political govern-

ment of England, as soon as it gave support to it, exercised a similar right of requiring conformity to the new doctrines, and the established ordinances. The Puritans loathed the corruptions of the Hierarchy, and sought for purity of doctrine and simplicity of worship. They had unwavering faith that God would regard their enterprise, — their government, — and their Church, in its unhesitating reception of His revealed truth, in its sincere desire to learn His will, and do what was pleasing in His sight, in its simple forms of adoration and worship, — with especial favor. Why should they not, in the full assurance of that faith, devoutly believe that God Himself had not only opened to them a way of escape from impending persecution; but that He had reserved this wilderness to that time, as the place for the establishment of that faith and that worship on an enduring foundation? In point of fact, the government which they established, did last for more than one generation, on the distinctive principles of their foundation; and left its impress on the future, in a more wide-spread liberty, not only for our day, but for after ages.

With the design and purpose by which they were actuated, with the deep conviction of the truth of their principles, of the importance of their enterprise, of the sacredness of the trust committed to them, and of their duty to use all lawful means to secure its success, — all their legislation may be said to have been religious legislation. They legislated in the fear of God, and with a profound sense of their responsibility to Him; which is more than can be said of the greater portion of the legislation at the present day.

If, however, we take a more restricted signification, it may well be maintained that all their legislation, which had a direct tendency to aid in the accomplishment of their great purpose to build up a true Church and a righteous State, each supporting the other, was religious legislation. All the legislation for the enforcement of good morals, of good order in the community, was in aid of this great object, and therefore in subservience to religion.

More especially may the legal provisions for the promotion of education be regarded as of that character. One great purpose of their polity was to raise up a diligent and faithful

ministry; and the college which they founded, and to which our present Massachusetts turns with such pride, had that for one of its objects.

It is, however, of the legislation having a more direct bearing upon the interests of religion, that I am to speak. We know from the character of their enterprise, what it must have been. We know from their records, what it was.

Of course, it had reference, in the first instance, to the support of the ministers who were settled over the different churches; who were participators in the hardships, hopes, and labors of the enterprise, and contributed so largely to its success.

At the first court, held Aug. 23, 1630: "*Impr.*, it was propounded how the ministers should be maintained."

"Mr. Wilson and Mr. Phillips only propounded. It was ordered that houses be built for them at the public charge. Sir Richard Saltonstall undertook to see it done at his plantation for Mr. Phillips, and Mr. Governor at the other plantation for Mr. Wilson. It was propounded what should be their present maintenance. After specifying the quantity of meat, malt, money, &c., it is added, 'all this to be at the common charge, those of Mattapan and Salem only excepted."[1]

Benedict, in his History of the Baptists, page 368, speaks of this, as "the first dangerous act performed by the rulers of this incipient government, which led to innumerable evils, hardships, and privations to all who had the misfortune to dissent from the ruling powers, in after times." And again, he says, "This was the *viper* in *embryo;* here was an importation and establishment, in the outset of the settlement, of the odious doctrine of Church and State, which had thrown Europe into confusion, had caused rivers of blood to be shed, had crowded prisons with innocent victims, and had driven the Pilgrims [he means Puritans] themselves, who were now engaged in this mistaken legislation, from all that was dear in their native homes."

This is certainly very unwarrantable language, in reference to the subject-matter. Whatever we may think, or say, of subsequent events, it is a grievous misuse of the vocabulary, to term this a "dangerous act," and a "viper in embryo." On the contrary, it was the most natural, consistent, and just proceeding that could be imagined.

[1] Mass. Records, vol. i. p. 73.

The people who adopted this measure were a small company, who had come here with their families, their religious teachers, and their household goods, to form a settlement. We will leave out of our consideration here, their expatriation, their desire to enjoy the worship of God unmolested, and their sacrifices for the accomplishment of their purposes. They were religious persons, deeply impressed with the importance of supporting the institutions of religion. They revered their teachers, looked to their wisdom for advice in temporal as well as spiritual things, and were bound to provide for them a support. If they had not done so, they would have been worse than the infidels. What more just, what less exceptionable, measure could they have adopted, than to assess, in such manner as to them seemed best, a tax upon themselves for that purpose? If they were content, there were no others who should object.

We have, I think, in the character thus ascribed by this historian to this simple and just provision for the support of their religious teachers, the key to the difficulties which afterwards arose between them and others, who, with different religious views, instead of founding other settlements in the wilderness, where they could enjoy *their* liberty of conscience, after their own modes and forms, chose rather to claim a right to participate in the privileges of the Puritans, at the same time that they placed themselves in a very obnoxious antagonism to some of their most cherished principles. They intruded themselves into the Puritan Commonwealth, set up their standard of opposition to the principles and laws which they found there, and then complained, because the Puritans were not inclined to change their laws for the especial accommodation of their antagonists.

I will consider this measure, as it developed itself afterwards, when I come to the question of their right of exclusion, and the manner in which they exercised it; my object being, just now, to rescue this first act of religious legislation from the viperous metaphor, which, without sufficient provocation, attempts to fasten its fangs into it.

One of the chief accusations against the Puritans, — perhaps the greatest of all, — one which comes with a curl of the lip, or a toss of the head, or some other significant manifestation to make it emphatic, arises out of the connection of their

churches with the politics of the State, — a union of Church and State, as it has been called. At an early day, they passed a law by which none but church-members were to be admitted as freemen, so that the right of voting in the affairs of the company, and of the government, as established by and in the corporate body, — the right of suffrage, — was confined to persons who were members of the Church.

Persons who care very little how many Quakers and Ranters were hung, are very sensitive respecting the safeguards with which the Puritans surrounded the ballot-box. Had they not some reason for the adoption of a sure rule?

Dr. Ellis, in his first lecture, stated that there is not in Boston, at the present day, any conceit, notion, fancy, or opinion, which did not exist soon after the settlement of Massachusetts; but I doubt, whether, among all the mischievous persons and all the preposterous notions of that day, there were any persons who maintained that there was such a thing as a *natural right of suffrage;* that is, a right *by nature*, in every body, to participate in the government of all others, as well as of themselves; that being the character of suffrage in a republican government. If there were any such, certainly the Puritans were not of their community.

Well, undoubtedly, we should not select church-membership as a criterion by which to determine who should have the right of suffrage at the present day. It behooves us, however, to be very careful that we do not adopt something much worse.

The law itself is in these words, "*To the end the body of the freemen may be preserved of honest and good men:* It is ordered, That henceforth no man shall be admitted to the freedom of this Commonwealth but such as are members of some of the Churches within the limits of this jurisdiction."

Can we lay our hands upon our hearts, and say, that all our laws regulating suffrage have as wise and honest an object and purpose as that disclosed in this enactment?

Why should the enlightened people of this day and generation denounce or censure the Puritans, because they regulated the right to participate in the government which they founded upon that basis? — upon a basis which, in their estimation, gave the suffrage to honest and good men, — exceptions, of course.

Thank God, being a church-member is not evidence that a person has a *bad* character, even in New York; although there may be exceptions which serve to show that such membership is not *conclusive* evidence of a good character, even in Massachusetts.

Had not the Puritans the legal right to limit participation in their government, in that manner? Was it morally wrong in them to do so? Was it unjust? Was it inexpedient? Unless we can answer some one, at least, of these questions emphatically in the affirmative, we convict ourselves, and not the Puritan Fathers, when we set ourselves up as censors, and condemn their legislation.

As to the legal right, in the first place! If the exposition which has been given of the provisions of the charter has been satisfactory, I need not add any thing upon this subject. Nothing can be more clear than their right to judge and determine whom they would admit to the participation of the privileges under their charter. They were expressly authorized to admit freemen; they were not to admit all comers. They must exercise a right of selection in some manner.

Was it morally wrong to adopt their principle of selection? With a concession of the principle that all rightful government should be for the greatest good of the community over which it is exercised, and that in a republican State, the question what measures will produce the greatest good must be determined by the majority of voices having the right of decision, I think I might venture the proposition, that any rule of suffrage which such majority should conscientiously determine to adopt, as that best calculated to promote the welfare of the whole, whatever else might be thought of it, could not be censured as morally wrong. But some enthusiastic advocate of universal suffrage might, perhaps, wish to be heard on that proposition; so we will confine ourselves to the Puritan Commonwealth.

Was it morally wrong in the grantees of the charter to determine, that the greatest good of their organization would be best promoted by a limitation of that character? I certainly do not suppose, that any one who has a reasonable sense respecting moral right and wrong, will be disposed to argue that question with me.

They profess to have done it, "to the end the body of freemen may be preserved of honest and good men." They are, at least, entitled to the credit of the motive on which they professed to act until that motive be disproved, and there is not the first particle of proof that they were not actuated by it. Admit that this rule did not assure to them the association of all the good and honest men in the community. Will any of you tell me what criterion they should have adopted, in their circumstances, which would have given higher assurance of the accomplishment of the worthy end which they proposed to themselves? If I should pause for a reply, I think none would be forthcoming.

Was this rule unjust? Who at that day should impeach it on this score? It was made by the grantees of a charter, and those whom they had admitted as associates, prescribing for themselves a limitation on which alone they would admit other associates.

The charter was, as we have seen, in form, and partly in fact, an act incorporating a company to which a large grant of land had been made, and to which was given the power to purchase and hold property, and the power also to plant and govern a colony upon the territory thus granted. The charter gave them expressly, what at this day follows as a corporate right, without any express words, the right to admit whom they pleased as freemen of the corporation; that is, as associates entitled to a participation in all their rights and privileges equally with themselves. They might have required a price for the privilege of an ownership in the lands and a participation in the franchise of the corporation, if they had thought proper. But money was no part of their object in the admission of freemen, or in voting for officers. They had not even arrived at that knowledge of the science of government which teaches that legislators may sell their votes in a caucus for the nomination of candidates for an office to which they hold the power of election, and then say that there was no bribery in that, because the nomination of the caucus was not an election. They might have required any other condition of membership which to them seemed just and right. Under these circumstances, who should advance a claim to thrust himself into a participation of their rights and privileges? The question answers itself. No one, unless he could say, that they

had held out to him a prospect of participation, and then refused it. No one said that this had been done, even by implication. The rule was adopted very soon after the settlement, and was known and understood. If there was any such individual case, it would not affect the principle.

Was the rule inexpedient? — is the remaining question. We might inquire here, on what principle of right it is that we are to judge and condemn them upon such a question. We may judge and express our opinion whether they acted wisely for their own interests, without assuming to censure them for their judgment respecting a matter which, as it was then presented, was one affecting their rights, property, and duties. — But let us try this question also. In considering the three preceding questions, I have treated them mainly as questions of right and of business in relation to a civil corporation. This presents itself in the same aspect; but we must also take into consideration the religious character of the enterprise.

And here there seems to be no possible room for doubt. It is true that it offered some temptation to persons to join the Church from sinister motives. Few persons, however, would venture, for secular reasons, to enter the pale of a church so strict in its observances; and the sure support which the churches would receive from the legislation of a General Court composed of their own members, would greatly overbalance any danger from hypocritical members.

This restriction of the privilege of freemen to persons who were members of the churches, is not to be regarded as evidence of intolerance or bigotry. Of itself, it required no profession of faith, — no creed.

For the purpose of admission to a church, a person must have assented to the creed of that church very much as at the present day, so far as the Church has a creed. And so, through the operation of this rule, any person who was admitted to the privileges of a freeman, must have given his assent to the creed. But this assent to the creed, merely, was not the reason why he was admitted to the franchise. Somewhat more than assent to the creed was required, in order to admission to the Church. The candidate must be a person of good character, honest, and of a blameless life. It was to secure a body of men, of such a

character, that this rule was adopted. And, moreover, church-membership was not of itself the sole qualification.

The Plymouth Colony undertook to secure the same result in a different mode. It was enacted there, that the deputies should propound candidates to the court, being such as have been also approved by the freemen of the town where such persons live. Then it was required that they be propounded at a June court, and stand propounded one whole year. And in the Revision of the Laws of that Colony in 1671, we find that none should be admitted as freemen but such as were, at least, twenty-one years of age, had the testimony of their neighbors that they are of sober and peaceable conversation, orthodox in the fundamentals of religion, with twenty pounds ratable estate, and to stand propounded a year, unless it was some person well known, or of whom the court might make present improvement.[1]

Which would best satisfy the candidate for suffrage at the present day, — the Puritan, or Pilgrim rule, — Massachusetts, or Plymouth? — more especially when there was another law of Plymouth by which freemen might be disfranchised, — a provision which, if it existed at the present day, and were enforced, would cause a great exodus among the voters. — Even Rhode Island would not admit persons whom they considered turbulent and unruly, to ownership, or to exercise the privileges of freemen.

Of itself, the rule did not prohibit immigration into the Colony. Whoever chose might come, notwithstanding the adoption of this rule. Persons ambitious of participating in the government might be influenced by it not to come; but it would be their ambition which prevented them in such case. Persons might not desire to live under a government, with a religious legislation such as might be expected from such legislators; but it would be the desire for a larger license which prevented them. The rule itself might be the remote cause; but another, operating more directly upon them, would intervene, and a maxim of the law teaches us to look to the near, and not to remote, causes, as the ground for complaint, if there be any. The rule denied to no one a participation in the protection which the government offered to persons and property.

[1] Plym. Col. Laws (Ed. 1836), p. 258.

But, still farther, all the alteration which Charles II., or his ministers, required, in respect to the right of suffrage, when, in 1662, he or they undertook to regulate the affairs of the Colony was, that "all the *freeholders*, of *competent estates*, not *vicious* in *conversation*, and *orthodox* in *religion* (though of different persuasions in church government) may have their votes in the election of all officers, civil and military."[1] Would this rule satisfy us better than church-membership? The duty of making up the list of voters, on this basis, would not be an enviable one, at this day; and an action for exclusion from the list might open a wide field of inquiry.

The laws having for their object the conversion of the Indians to Christianity, were part and parcel of the religious legislation of the Colony.

The laws for the observance of the Lord's day were very strict, and provision was early made for instructing the Indians on that subject.

There were penalties for neglecting the worship of the churches, disturbing the order thereof, and for reproaching the ordinances.

The law against *Heresy* provided, that "if any *Christian* within this jurisdiction shall go about to subvert and destroy the Christian faith and religion, by broaching and maintaining any damnable heresies," of which there followed a very respectable catalogue, commencing with, "denying the immortality of the soul," "every such person continuing obstinate therein, after due means of conviction, shall be sentenced to banishment."

Persons above sixteen years of age professing the Christian religion, might be punished for denying the inspiration of any of the books of the Old and New Testaments.

But the introduction to the law against Heresy disclaimed all power over the faith and consciences of men.

And in the proceedings respecting the celebrated Cambridge Platform, the General Court declared that they could not see light to impose any forms, as a binding rule, but gave their testimony to it.

The Antinomian controversy was not merely a difference of opinion upon a speculative doctrinal question, but an open attack upon what was regarded as sound doctrine, in such a manner as

[1] Hutch. Coll. Papers, p. 379.

to cause a commotion in the State, as is shown by the disarming of the followers of Wheelwright; a measure which would not have been resorted to, but in fear of an outbreak.

Another part of the religious legislation of the Puritans, upon which much vituperation has been expended, and many sneers wasted, is that regarding witchcraft.

Are we all quite sure, that there was actually no witchcraft in the days of the Puritans?

We have, at this day, not only our rappings and tippings, our rope-tyings and our planchettes, but we summon spirits from the vasty deep, and, unlike those of Hotspur, they do come, bringing with them communications from the spirit-world, which must give us a very poor idea of heaven, if we suppose them to have come from that quarter.

Is not the difference between this age and the former mainly in the fact, that witchcraft with us does not come on accusation; but that our witches volunteer their manifestations, are quite willing to display their powers, and are thus far more kindly disposed than their predecessors, not having, as yet, taken to sticking pins into people?

For my own part, my imagination could just as easily mount an old woman on a broomstick, and set her careering through infinite space, as it could get up a conversation with General Washington about fly-traps, or with John Adams on the respective merits of hair-dyes, or some other subject of even less significance. And when I give credence to all the supernaturals of our present time, I intend to believe also, unreservedly, in the Salem witchcraft!

But, suppose we hold a little longer to the belief that the witchcraft of the former time was trickery and delusion; upon what sound basis are we to single out the Puritans for condemnation?

The legislation of the Puritans in regard to witchcraft was but the legislation of the age in which they lived, and with their respect for the Jewish law, they, of all people, must have had such legislation.

In England, the law against witchcraft was enforced with as little doubt of its existence, and of its being a proper object of criminal cognizance, as prevailed in Massachusetts; and the executions there were much more numerous.

Even the Plymouth Colony had its legislation against it; and if the witches had not thought that that small community offered too limited a field in which to exercise their vocation, I know no reason for believing that the good people there would not have enforced their laws against them. How should they have done otherwise?

Only a small portion of the people of Massachusetts, however, had any active participation in the prosecutions, and many made grave objections to them.

The General Court appointed a special court for the trials; and one at least of the judges of this court, and several of the justices, were much dissatisfied with the proceedings.[1] Of the majority of the judges who were present, it may be said, that they had the belief in witchcraft, which that most eminent and upright judge, Sir Matthew Hale, entertained as firmly as they did; and that they had quite as much evidence as was introduced in cases before him, in which he was instrumental in procuring convictions, on which he gave sentence of death, with a conscientious belief that he was doing good service to God and the State. He seems not to have wavered in this belief, to the day of his death.

It has been suggested, that there was one physician in Massachusetts who, if his life had been spared, might, either by his professional skill or by his wise counsels, have done something to prevent or stay this lamentable delusion. It is a subject of profound regret that he should have died a year before his labors would have been so exceedingly useful. Those who were living "gave countenance and currency to the idea of witchcraft in the public mind, and were very generally in the habit, when a patient did not do well under their prescriptions, of getting rid of all difficulty by saying that 'an evil hand' was upon him."[2] Very convenient, indeed!

Roman Catholic priests and Jesuits were forbidden to come within the jurisdiction.

The right of the colonial government to exclude persons actually settled in the Colony, existed from the power to make

[1] Thomas Brattle's Letter, Mass. Hist. Coll., 1st Series, vol. v. p. 75. Bentley's Description of Salem, ib., vol. vi. p. 266.

[2] Upham's Witchcraft at Salem Village, vol. ii. p. 361.

laws, constitute courts and magistrates, and punish offences. Banishment was a recognized mode of punishment; and this was their common penalty for grave offences against their religious polity. It was peculiarly adapted to a Commonwealth which was to be governed on religious principles, and to suppress the promulgation of religious doctrines inimical to its welfare. The Puritans desired to remove the disturbers of their peace; and many, if not most of these, were religious controversialists.

Difficulties, which ended in sentence of banishment, for offences against their religious legislation, arose in various ways.

You will not be shocked, I trust, if I venture the supposition that there is nothing in the whole world on which conscience is so sensitive, or by which it is so grievously violated, as the compulsory payment of money to be appropriated towards any thing connected with religion.

A man pays taxes, which he knows will be appropriated to the support of an unrighteous war for the acquisition of territory belonging to the Indians, or to some weaker nation; for wasteful expenditure on public buildings, or corrupt purchases for the benefit of contractors, or for the transportation of patent medicines in the mail under the franks of members of Congress, — he shrugs his shoulders, but his conscience is quiet. Let him understand, however, that his tax is appropriated to the support of a minister of the gospel, who preaches some doctrine to which he does not assent, — be the difference but

> "the division of the twentieth part
> Of one poor scruple, — nay if the scale do turn
> But in the estimation of a hair,"—

his conscience immediately takes the alarm, and he becomes the subject of persecution.

The Puritans being satisfied with the mode of supporting ministers by a tax, which we have seen was originally adopted at the first meeting of the Court of Assistants in the Colony, continued it by subsequent enactments. All inhabitants were assessed, proportionably to all charges in Church and Commonwealth. If all the inhabitants had been as closely united in their religious sympathies as were the first emigrants, there could have been no objection to this, at least none of a conscientious character. But this was impossible in the nature

of things. Other emigrants came, with different tenets. It was, of course, impracticable to exclude all such, however great the caution might have been. Change of opinion must, also, have caused more or less of dissent. Difference of views caused opposition to the tax. The government disclaimed any right to interfere with the consciences of men, but insisted upon obedience to the law as a civil duty. The recusants denied the authority of the magistracy to enforce the commands of the first table, and made speeches against it. The magistrates alleged that this was not only unsound in doctrine, but endangered the authority of the civil State. The recusants preached. The magistrates banished. The recusants insisted that they were persecuted for their principles. The magistrates averred that they were punished for their practices.

Two questions may arise here. First, — Whether this was a tax for the support of religious doctrines, or one for the support of the civil State through the agency of religious teaching. If the first, then, by its enforced collection, conscience was violated. If the latter, then, by a refusal of payment, a rightful civil law was defied. Second, — Whether the speeches which were made, were the dictates of conscience, which required a testimony of that character against the enormities of the law, — or the utterances of the mere human will, determined to gratify its own wilfulness, and, if possible, to retain the money in its own pocket.

These questions, as the lawyers would say, may be regarded as exceedingly nice, — questions about which men may argue; and, like the village schoolmaster, "e'en though vanquished," they may "argue still."

As I am not one of those who can

> "distinguish and divide
> A hair, 'twixt south and south-west side,"

I must leave it to the casuists of the next two centuries to determine whether or not the institutions of religion may be such a support to the civil State, that a tax, by the State, to sustain them, can be regarded as a mere civil regulation, violating no man's conscience, even if the money be applied to the maintenance of teachers who differ from him, — whether or not the religious doctrine and the civil support may be regarded as so far distinct, that the civil magistrate may tax on the ground of

the civil right, and the party pay without interference with the religious right. Whatever opinions may be entertained, the Puritans, I think, took, substantially, that distinction, and their rule, thus stated, survived the Colony, lived through the Province, was incorporated into the Constitution of 1780, withstood the efforts of two Constitutional conventions for its abrogation, and yielded at last, more than two centuries after its first introduction.

It is a matter of recent history, that a republic founded upon a substratum of infidelity has but a short existence. The duration of one which shall disclaim the support of religious teachings, and rely upon the intelligence attendant upon universal suffrage, and the purity derived from a universal scramble for office, is a problem which has not yet received its solution.

But to leave the Puritans here would not be doing them justice on this subject. They have been charged with inconsistency, and persecution, in reference to these proceedings.

Mr. Benedict, just quoted, says further of the original order for the maintenance of the ministers, —

"From these resolutions on board this floating vessel, which by subsequent acts became a permanent law, subjecting every citizen, whatever was his religious belief, to support the ministry of the established church, and to pay all the taxes which the dominant party might impose for their houses of worship, their ordinations, and all their ecclesiastical affairs, proceeded the great mistake of the Puritan Fathers. And from the same incipient measure grew all the unrighteous tithes and taxes, the vexatious and ruinous lawsuits, the imprisonment and stripes of the multitudes who refused to support a system of worship which they did not approve."

After other remarks of a similar character, he adds, p. 369, —

"The most charitable exposition we can give of this unpleasant subject is, that good men with bad principles were led astray; that although they were driven by persecution from their native land, and here intended to form an asylum for the oppressed who should fly to them for shelter, of every nation and of every creed; yet from the strength of habit, and the general opinions of mankind, in that age, they dare not leave the sacred cause to its own inherent influence; and the spirit of the times, rather than the disposition of the men, hurried them forward to those persecuting measures which have fixed an indelible stain on their otherwise fair name."

Assuming the matter to be one involving a question of conscience, this might be true, if they intended to form an asylum for persons of all creeds, to come and promulgate all doctrines, even to denunciation of their own most cherished principles. But the fact being shown to be just the reverse of all this, the allegation of persecution fails, along with that of inconsistency.

A man persecutes nobody, by defending his own from encroachment. The lands within their chartered limits were theirs. The government was theirs. The faith and modes of worship were theirs. Under their grant from the Council at Plymouth and their charter from the Crown, they secured to themselves, as we have seen, substantially a fee-simple in their lands, which they could protect against all encroachments. They endeavored to secure to themselves, also, a theologic fee-simple, so to speak, or at least a life-estate, and they were exceedingly tenacious of this, and more sensitive to trespasses upon it than to trespasses upon property, in the proportion that the concerns of religion held a higher place in their estimation than mere temporal affairs. There was little temptation to commit trespasses upon their temporal fee. But there were other zealots besides themselves, who were quite desirous of becoming tenants in common, at least, if not disseisors, of their ecclesiastical fee. The attempt was promptly met, first by warning off; and when that failed, by an ecclesiastical action of trespass, resulting in a fine; and when that failed, by a process of ejectment, called a sentence of banishment.

It would be but upon a very superficial view of the subject, to say, that they had no right to do this, and that it was inconsistent with their position in England. The Puritans in England, like others there who dissented, were mostly natives of the soil: they had natural rights there, — a right to form their opinions upon religious subjects, equally with all other inhabitants of that country; an equal right to express them peaceably; a right to adopt their creed and forms of worship, according to the dictates of their consciences (even if the government might tax them); and a right to the protection and support of the government, in the enjoyment of their rights and liberties. That was their country, their home: there were their families, and their relatives, friends, all their associations. They had no other place in which to enjoy their rights. Members of the Church of

England had the same natural rights, and no more. Other dissenters from her doctrines had the same rights, and no less. The Church of England, claiming to be established by law, required conformity to her creed and usages and forms, in matters deemed by others essential errors; and hence violation of conscience, and persecution.

It was open to all who might be able, to escape from this persecution. It was natural that those who attempted it should associate for the purpose. The Puritans did so, — provided for themselves a place of refuge in the wilderness, and obtained a charter of government. This was emphatically for themselves and those who sympathized with them, and not for others. The creeds, modes, and forms of others who dissented, were as obnoxious to them as those of the Hierarchy. They were not required by any principle of religion, or morals, or comity, or benevolence, to provide for a theologic warfare against themselves and their cherished opinions on the western shore of the Atlantic; and they did not do it. They did not profess toleration. Why should they? With a perfect conviction that they were right, of course others were wrong. And error was fatal! We have as little of toleration at the present time, in relation to some other things, and with less excuse. Others who came were bound to respect their religious, equally with their civil, institutions. There was no persecution in their attempt to maintain them, by the exclusion of those who could be restrained in no other way. No one had a right to come and set up an opposition, and plead "conscience." That plea was open to a general demurrer. "What of that!" You have no right to bring such a conscience here.

I submit that the argument is unanswerable, and a full justification of the general principle upon which the Puritans acted. We may think their creed too narrow. There was, doubtless, mistake, anger, error, excess, wrong, in individual cases. I seek not to justify such things. All I claim is a vindication of the legal and moral right of the Puritan Fathers to govern their own Commonwealth, the child of their labors, of their prayers, of their hopes, and of their fears also; and to exclude others, who could not join in fellowship with them, from the enjoyment of their privileges, without being accused of persecution.

Whether their ecclesiastical right could stand on this foundation for more than one or two generations, is another and a different question. It would, certainly, not be a very long period before those who had been born on the soil would have as great a right of non-conformity to the existing state of things, as the Puritans had in England, and upon similar grounds. They had, in fact, no theologic fee-simple, and could not transmit an inheritance in any exclusive right. They had nothing more than a life-estate, in this respect.

But the matter was not suffered to develop itself in that way. The theologic trespassers brought it to a more direct and speedy issue.

The members of the Church of England seem to have left the Puritan Fathers in the undisturbed enjoyment of their rights. They neither sought nor were involved in any controversy with them here, in the early settlement, unless the controversy respecting the charter had that aspect.

With the exception of the Quakers, the Anabaptists were the most prominent in this religious aggression.

In 1639, several persons were fined for attempting to gather a small company of believers.

A law for the banishment of Anabaptists was passed in 1644, with a preamble giving them a very bad character.[1]

"The heart-rending sufferings which were inflicted on John Clark, Obadiah Holmes, and others" (so Benedict characterizes the affair), in 1651, may serve to illustrate the spirit of the times. Clark, Holmes, and John Crandall, "representatives of the church at Newport," Rhode Island, came to Lynn and held a meeting at the house of a brother, on the plea that he was too old to go to Newport. Benedict says, "The circumstance of these men being representatives, leads us to infer that something was designed more than an ordinary visit." Undoubtedly! They came to do what they knew was a violation of the laws of Massachusetts. — The constable came, as might have been (probably was) expected, broke up the meeting, arrested, and took them to the ale-house, or ordinary, and being, evidently, a man zealous in the faith, and doubtless supposing that the meeting-house was a more suitable place than the ale-house for such people, — wishing also,

[1] Mass. Records, vol. ii. p. 85.

probably, that they should hear a little sound doctrine, — he proposed, at dinner, if they were free, to take them to the meeting. They replied, "We are in thy hand; and if thee will take us to the meeting, thither will we go." But they informed him further, "If thou forcest us into your assembly, then shall we be constrained to declare ourselves, that we cannot hold communion with them." The zealous constable did not care for that, and so to the meeting they went. Taking off their hats at the threshold, when they were seated they put them on again, and Clark opened his book and fell to reading. The constable, by order of a magistrate, took off their hats. When the preaching and praying were over, Clark, as a stranger, stood up and desired to say a few things to the congregation. The preacher said, we will have no objections to what has been delivered. But Clark must explain his gesture of dissent (putting on his hat); and the explanation being, substantially, that to conjoin and act with them would be sin, and that he could not judge that they were gathered together and walked according to the visible order of the Lord, he was told he had said and done that which he must answer for, and was silenced. Shortly after, they were tried; and, according to the account, his defence embarrassed the judges. Clark says, —

"At length the Governor stepped up and told us we had denied infant baptism, and, being somewhat transported, told me I had deserved death, and said he would not have such trash brought into their jurisdiction; moreover he said, you go up and down and secretly insinuate into those that are weak, but you cannot maintain it against our ministers. You may try and dispute with them."

They were fined, and refusing to pay were imprisoned. But Clark caught at the last remark of the Governor, as if it were a challenge to a debate, and the next morning sent a formal acceptance, with a request that a time might be named; shrewdly prefacing it with, "Whereas it pleased this honored court yesterday to condemn *the faith and order*, which I hold and practise," — so that the dispute might be upon his faith and order. The magistrates were not to be caught in that way, but inquired whether he would dispute upon the things contained in his sentence, &c. "For," said they, "the court sentenced you not for your judgment and conscience, but for matter of fact and practice." Clark replied, "You say the court sentenced me for matter of fact and

practice; be it so. I say that matter of fact and practice was but the manifestation of my judgment and conscience, and I make account, that man is void of judgment and conscience, that hath not a fact and practice suitable thereunto."

The magistrates saw, doubtless, that the debate would involve his faith and his conscience, and, if allowed, that he would gain the opportunity which he desired, of promulgating his doctrines under their permission, and therefore protection, and declined to allow it. Clark's friends paid his fine, and he was discharged.

But Clark, as Benedict says, "knowing that his adversaries would attribute the failure of it [the debate] to him," immediately on his release drew up an address, reciting, that through the indulgency of tender-hearted friends, without his consent, and contrary to his judgment, the sentence had been satisfied and a warrant procured by which he was secluded the place of his imprisonment, by reason whereof he saw no call but to his habitation; yet, lest the cause should suffer, he signified that if it should please the magistrates, or the General Court, to grant his former request, he should cheerfully embrace it, and come from the island to attend to it.

The magistrates replied, that they conceived he had misrepresented the Governor's speech in saying he was challenged to dispute, adding, —

"Nevertheless, if you are forward to dispute, and that you will move it yourself to the court or magistrates about Boston, we shall take order to appoint one who will be ready to answer your motion, you keeping close to the questions propounded by yourself; and a moderator shall be appointed also to attend upon the service; and whereas you desire you might be free in your dispute, keeping close to the points to be disputed or without incurring damage by the civil justice, observing what hath been before written, it is granted; the day may be agreed if you yield the premises."

Clark took exception to the answer, and repeated his former motion, saying, if the General Court should accept it, and, under the secretary's hand, should grant a free dispute without molestation or interruption, he should be well satisfied. Benedict says, "Mr. Clark all along kept in view the law which had been made seven years before, which threatened so terribly any one who should oppose infant baptism. This was the reason of his

requesting an order to dispute in legal form." And he adds, "Mr. Clark, therefore, left his adversaries in triumph." Again, "So completely was he at home in the baptismal controversy, that he was evidently as desirous for the public discussion, as his opponents were to avoid it."

Thus it was that Mr. Clark returned to his habitation, a "persecuted" man, who had endured "heart-rending sufferings."[1] Judging from the fact that he came willingly and knowingly; that he was nothing loath to be forced to go to a meeting where he should be constrained to declare his dissent; that he used the trial to make an open defence of his doctrines; that he was so anxious to debate the matter afterwards with the ministers, if he could have a clear field without danger of the law; and that he finally left his adversaries in triumph;—it is at least an open question, whether the *persecution* was not more in the avoidance of the public free debate, than in the fine, and imprisonment for non-payment. He seems in all this to have had an eye to the things temporal, in regard to his controversy with Mr. Coddington, perhaps quite as much as to things spiritual.[2]

Clark carried his complaints to England;[3] and Sir Richard Saltonstall wrote to Cotton and Wilson, the ministers at Boston,—

"It doth not a little grieve my spirit to hear what sad things are reported daily of your tyranny and persecutions in New England, as that you fine, whip, and imprison men for their consciences. First, you compel such to come into your assemblies, as you know will not join you in your worship; and when they show their dislike thereof, or witness against it, then you stir up your magistrates to punish them for such (as you conceive) their public affronts. . . . We pray for you, and wish you prosperity every way; hoped the Lord would have given you so much light and love there, that you might have been eyes to God's people here, and not to practise those courses in a wilderness, which you went so far to prevent. These rigid ways have laid you very low in the hearts of the saints. I do assure you, I have heard them pray in the public assemblies, that the Lord would give you meek and humble spirits, not to strive so much for uniformity, as to keep the unity of the spirit in the bond of peace."

[1] Benedict, pp. 371–375; Backus's Hist. of New England, vol. i. pp. 214–228.

[2] See Palfrey, Hist. N. E., vol. ii. p. 359.

[3] Ill News from New England, Mass. Hist. Coll. 4th Series, vol. ii. pp. 3, 27.

Mr. Cotton, answering "for Brother Wilson and self," said of Holmes, "As for his whipping, it was more voluntarily chosen by him than inflicted on him. His censure by the Court, was, to have paid, as I know, £30, or else be whipt; his fine was offered to be paid by friends for him freely, but he chose rather to be whipt; in which case, if his suffering of stripes was any worship of God at all, surely it could be accounted no better than will-worship." . . .

To the other paragraph above quoted, he replied, "You know not, if you think we came into this wilderness to practise those courses here, which we fled from in England. We believe there is a vast difference between men's inventions and God's institutions; we fled from men's inventions to which we else should have been compelled; we compel none to men's inventions. If our ways (rigid ways as you call them) have laid us low in the hearts of God's people, yea, and of the saints (as you style them), we do not believe it is any part of their saintship. Nevertheless, I tell you the truth, we have tolerated in our churches some Anabaptists, some Antinomians, and some seekers, and do so still at this day. We are far from arrogating infallibility of judgment to ourselves, or affecting uniformity; uniformity God never required, infallibility he never granted us."[1]

These proceedings serve well to illustrate not only the religious legislation and civil administration of that period, but the spirit and temper of all parties. The Bible was the guide of the Puritans, and their law. Their legislation was founded upon it. Compelling men, therefore, to conform to their laws, was compelling them to conform, not to men's inventions, but to God's institutions.

The proceedings in reference to the "Quakers and Ranters" come under consideration, as a part of the religious legislation of the Puritan Commonwealth; and notwithstanding the matter has been discussed with great ability and research by Dr. Ellis, in the third lecture of this course, it may be proper for me, as it comes also within the scope of my subject, to say a few words upon it, instead of passing it by with a mere recognition.

Polonius, along with other very good advice to his son, Laertes, counselled him to —

> "beware
> Of entrance to a quarrel: but, being in,
> Bear't, that the opposed may beware of thee."

[1] See the letters entire, Hutch. Coll. Papers, pp. 401–407.

The people of Rhode Island happily acted upon the first part of this maxim, in reference to the Quakers who came among them. Had the Puritans done the same, it is probable that the nuisance would have been equally harmless in Massachusetts. But such a forbearance would have been wholly at variance with their principle of excluding disturbers of their peace, and with their practice of rigidly enforcing their laws. They entered, therefore, upon the quarrel sought to be fixed upon them, with an energy that made it apparent they were not unmindful of the principle embodied in the latter part of Polonius's advice.

With a commendable moderation in the outset, they evinced a rigid determination to maintain their authority. They warned, they sent away, they fined, they whipped, they imprisoned, and branded. When these more usual punishments failed, ears (not many of them) were cut off. This cruel, but in England, at that day, not very unusual, punishment was inefficient also. Then came banishment, with a condition annexed, that a return without permission was on pain of death. And when all else was utterly ineffectual, the penalty of death was inflicted.

The Federal Commissioners of the four colonies (Massachusetts, Plymouth, Connecticut, and New Haven), at their annual meeting in 1656, had recommended that such persons, if any come, should be forthwith secured or removed out of all the jurisdictions. When, two years afterwards, it was found that punishments of the milder character were of no avail, the Federal Commissioners propounded and seriously commended to the several General Courts to make a law of the precise character of that under which Massachusetts inflicted the extreme penalty.[1] In other instances, prior to this time, parties had been banished with a like condition, and there had been no instance of a violation of it. So it was believed would be the case in this instance. But here was a different class of offenders,— fanatical, or self-willed, — self-devoted to their will. We may call it conscience, but it was conscience as defined by the Indian, "Something here [laying his hand on his breast], which says, 'I won't.'" We may call it insanity; but, if insanity, it was of the same self-willed character.

[1] Palfrey, Hist. of New England, vol. ii. p. 469. John Winthrop, of Connecticut, attached a qualification to his subscription.

It is quite possible that something of human passion may have been excited in the magistrates of the Colony by this wanton contempt of their right and their authority. But mischief arising from mere contempt, — still less, resentment and passion consequent upon such contempt, — could furnish no justification for proceeding to the last extremity. In that view the most that could be said in extenuation would be, that there was a successful courting of martyrdom by a series of persistent efforts, and under circumstances which rendered it next to impossible for the government to refuse the crown. That the Quakers, supposing them to be sane, richly deserved any suitable punishment for disturbing the peace, is not to be doubted.

The cry of persecution of the Quakers by the Puritans has been long and often repeated. It is within a few days, that I saw, in a notice of a sombre work, entitled "New-England Tragedies," this paragraph: "They [the Puritans] persecuted the Quakers with immense zest and activity; but it cannot be denied that the Quakers gave great provocation."

Now I take a direct issue with the first part of this allegation, and with all other averments that the Puritans of Massachusetts persecuted the Quakers. Let us bear in mind that it was not for non-conformity that the Quakers were prosecuted; and let us understand the significance of the terms we use. What is *persecution?* If we turn to the great work of our late learned and most worthy associate, Dr. Worcester, we shall find a satisfactory definition; and tried by that standard, or by any other entitled to regard, I maintain, without hesitation, that so far from the Puritans persecuting the Quakers, it was the Quakers who persecuted the Puritans. Pardon me, if I consider this somewhat in detail.

There was no pursuit either "with malignity or enmity" in the proceedings of the magistrates, even if anger occasioned by such persistent annoyance may have been excited. The Puritans did not "harass" the Quakers "with penalties." The Quakers harassed the Puritans, and the Puritans inflicted penalties for the transgression of their laws, as other communities inflict penalties for transgressions. There must be something more than this to constitute persecution, or the tenants of our state prisons may cry out, persecution! So again, it was not the Puritans who

"afflicted," "distressed," "oppressed," and "vexed," the Quakers, on account of their opinions; but the reverse of all that.

Wenlock Christison, the last person upon whom sentence of death was passed, is reported by Sewell, in his History of the Quakers, to have said to the court, "If ye have power to take my life from me, God can raise up the same principle of life in ten of his servants, and send them among you in my room, that you may have torment upon torment, which is your portion; for there is no peace to the wicked, saith my God." That states the truth of the matter, so far as persecution is concerned. The Puritans had no peace, but "torment upon torment" from the Quakers.

The only reasonable question which can arise, is, Were the Puritans justified in the infliction of the extreme penalties? That the Quakers harassed, afflicted, distressed, oppressed, and vexed them, may not be a sufficient justification for that.

Was there danger to the Puritan Commonwealth, — danger of its overthrow, — danger of the subversion of the principles upon which it was founded? Every other expedient to rid themselves of the nuisance had been tried in vain; and this punishment was denounced as the penalty for a return from banishment, in the hope and expectation that its terror would be effectual, and render its infliction unnecessary.

When this proved otherwise; when their principles were denounced, their authority derided and defied, their peace disturbed, and they were dared to carry into execution their own decrees, — if there was danger to their institutions, what course ought the magistrates to have adopted?

The Quakers courted death, if the Puritans dared to inflict it. They despised and rejected the mercy which would have saved them. Assuming that they were sane, however much we may lament the occurrence, why should we waste our sympathies on them, if, by their proceedings, they endangered the Commonwealth into which they intruded? It is said now, that they were more fit subjects for an insane hospital than for any of the punishments which were inflicted. If they were insane, we cannot hold the Puritans responsible because we have discovered that fact two centuries afterwards. There was no such supposition at the time, neither was there an insane hospital.

Great odium has been cast upon the law and its administration, in the infliction of those extreme punishments, and upon the clergy, so far as they participated. I submit, whether the responsibility is not chargeable rather upon the lamentable state of medical science at that time, which, while busying itself with catnip and elecampane, millipedes and powder of baked toads, had not discovered that there was any other form of mental disease than that which manifested itself in a furious derangement. How should lawgivers, judges, and jurors, or clergymen even, ascertain the fact of insanity, — a matter so foreign to their ordinary studies, — when the studies and diagnosis of the physician failed to perceive it. Medical science at a much later day, under the lead of jurisprudence, has redeemed its character. The medical profession having left the investigation of the virtues of baked toad-powder for that of the phenomena of mental disease, the law seeks information on that subject, in aid of its administration.

Medical testimony is heard on the question, sane or insane? Medical experts give their opinions, and the interests of humanity are subserved, and the cause of justice often promoted; though it must be acknowledged, that the notion of mental derangement is carried to an extreme, when a jury finds a defendant sane the moment immediately before, and sane again the moment immediately following, the commission of a very deliberate homicide, but insane at the precise moment when the deed was committed. I admit that the Bench deserves censure, when it fails to rebuke such a perversion of principles. But it would be unreasonable to expect too much from a judiciary elected by a popular vote, and whose tenure of office is for a short term of years.

Upon the question whether their institutions were endangered by the Quakers, the Puritans are entitled to be heard.

In a humble petition and address of the General Court, presented to the King in February, 1660, it is, among other things, said, —

"Concerning the Quakers, open, capital blasphemers, open seducers from the Glorious Trinity, the Lord's Christ, our Lord Jesus Christ, &c., the blessed Gospel, and from the Holy Scriptures as the rule of life, open enemies to government itself as established in the hands of any

but men of their own principles, malignant and assiduous promoters of doctrines directly tending to subvert both our churches and state; after all other means, for a long time used in vain, we were at last constrained, for our own safety, to pass a sentence of banishment against them, upon pain of death. Such was their dangerous, impetuous, and desperate turbulency, both to religion and to the state, civil and ecclesiastical, as that, how unwilling soever, could it have been avoided, the magistrate at last, in conscience both to God and man, judged himself called, for the defence of all, to keep the passage with the point of the sword held toward them. This could do no harm to him that would be warned thereby; their wittingly rushing themselves thereupon was their own act, and we, with all humility, conceive a crime bringing their bloods upon their own head."[1]

Assuming this representation to be true, the colonists must stand excused.

Dr. Palfrey says, — "Imprudently calculating on the effect of their threats, the Court had placed themselves in a position which they could not maintain without grievous severity, nor abandon without humiliation and danger. For a little time there seemed reason to hope that the law would do its office without harm to any one."

Again, — "Whether or not their imaginations had exaggerated the original danger, it could no longer, after an experiment of more than three years, be justly considered great."

And again, — "But among the colonies of New England, it is the unhappy distinction of the chartered — and therefore at once more self-confident and more endangered — colony of Massachusetts, to have been the only one in which Quakers who refused to absent themselves were condemned to die. Her right to her territory was absolute, deplorable as was the extreme assertion of it. No householder has a more unqualified title to declare who shall have the shelter of his roof, than had the Governor and Company of Massachusetts Bay to decide who should be sojourners or visitors within their precincts. Their danger was real, though the experiment proved it to be far less than was at first supposed. The provocations which were offered were exceedingly offensive. It is hard to say what should have been done with disturbers so unmanageable. But that one thing should not have been done till they had become more mischievous, is plain enough. They should not have been put to death. Sooner than put them to death, it were devoutly to be wished that the annoyed dwellers in Massachusetts had opened their hospitable drawing-

[1] Mass. Records, vol. iv. part i. p. 451.

rooms to naked women, and suffered their ministers to ascend the pulpits by steps paved with fragments of glass bottles." [1]

But if the danger of the civil Commonwealth was not extreme, that of the religious government connected with it was imminent. If the Quakers might contravene and defy the laws which protected the religious institutions and worship of the Puritans, all others might do the same. Their peculiar religious government was thus in extreme peril. With regard to that, the controversy was preservation or destruction; and the result was the latter.

The infliction of the punishment of death did not avail. The Quakers had an indomitable perseverance, and much encouragement to continue the contest. The law inflicting this penalty had passed but by a majority of one. There was much opposition to its execution. The military guard shows the fear which existed of an outbreak. The opposition was such that the government gave up any farther attempt to execute the extreme penalties. The Quakers came in greater numbers, and committed greater extravagancies. The government mitigated the penalties, and finally submitted to the intrusion. The Quakers triumphed; — and the experiment of the Puritans, — the theologic freehold, — the Commonwealth which was to exclude unsound doctrine and practice, — failed then and there, — and, so far as we can perceive, from that time forth, for evermore.

The civil government did not fail, the religion did not fail; but the principle of the legal exclusion of error received a fatal blow.

The failure was not merely because the Quakers had conquered, but by reason of the causes through which they had conquered.

I quote from Dr. Palfrey once more, p. 482, —

"It was settled that the Governor and Company of Massachusetts Bay were not to have the disposal of their home. They had bought it, and paid dear for it. They had on their side that sort of rigid justice which accredited writers recognize, when they lay down the rule that a perfect right may be maintained at any cost to the invader. But trespassers had come who would not be kept away, except by violent measures, which had

[1] Palfrey's New England, vol. ii. pp. 474, 476, 484.

produced only a partial effect, and which the invaded could not prevail upon themselves any longer to employ. The feeling of humanity, which all along had pleaded for a surrender, at length uttered itself in overpowering tones."

And Sir Ferdinando Gorges, in his "Brief Narration of the Original Undertakings of the Advancement of Plantations into the Parts of America," published in 1658, speaking of the charter, says, —

"By the authority whereof the undertakers proceeded so effectually, that in a very short time numbers of people of all sorts flocked thither in heaps, that at last it was specially ordered by the King's command, that none should be suffered to go without license first had and obtained, and they to take the oaths of supremacy and allegiance. So that what I long before prophesied, when I could hardly get any for money to reside there, was now brought to pass in a high measure. The reason of that restraint was grounded upon the several complaints, that came out of those parts, of the divers sects and schisms that were amongst them, all contemning the public government of the ecclesiastical state. And it was doubted that they would, in short time, wholly shake off the royal jurisdiction of the Sovereign Magistrate."[1]

We can see now that it was impossible that their peculiar religious institutions, — "God's institutions," as Mr. Cotton called them, — should be maintained for a long period against the influx of population "contemning the public government of the ecclesiastical state" here: we can see that it would have been better, (to use a common form of speech), infinitely better, had they voluntarily yielded to the pressure, at an earlier day, and quietly submitted to a modification of their religious establishment, giving greater liberty for dissent, and more tolerance to opposition. The civil state can hardly be said to have been in danger of overthrow. It may not have been wise, it may not have evinced sound statesmanship, for them to attempt to maintain their experiment against the intrusion of the Quakers, considering the opposition which was made to it.

If, under the existing circumstances, they saw the impending inevitable consequences, they cannot be held excused in sacrificing life to the end that their church polity might be vigorously enforced for a little time, only to be overthrown within a short

[1] Mass. Hist. Soc. Coll., 3d Series, vol. vi. p. 80.

period. Anger and passion, under great provocation, can afford at best but palliation.

But, assuming that there was no danger to their civil government, the principle which lay at the foundation of their whole government, civil as well as ecclesiastical, — the principle of excluding what they deemed fundamental error in religion by the civil arm, — was on trial; and if, on the other hand, they might well believe, and did believe, that God's institutions committed to their charge could be sustained, error excluded, their peace preserved, and their peculiar Commonwealth maintained, by the rigid enforcement of their laws, even unto death, the danger which menaced their institutions from the proceedings of the Quakers must hold them excused. On what authority shall we pronounce that they must have seen the first, and could not have acted upon the last, of these propositions?

Their Commonwealth was one of small beginnings. If it could have been kept a small Commonwealth, — distinct and independent, its religious legislation enforced as it might have been under such circumstances, — it would, doubtless, have preserved its original constitution much longer; and with their knowledge of the mutability of human affairs, they could not have anticipated that it was to endure for all generations. They were authorized originally, by the circumstances to which I have referred, to anticipate for it a reasonable duration, and they were men who could commit to God's providence the ordering of the future. The extract from Sir Ferdinando Gorges' "Brief Narration" shows that they did not anticipate that the example of their emigration would be followed by such a numerous company of men, who, of divers sects and with divers schisms, "contemning the public government of the ecclesiastical state," claimed liberty, not so much to worship God according to the dictates of their consciences, as liberty not to worship Him at all.

There is a grave question, I think, not as yet sufficiently considered, how far writers of fiction, whether of prose or poetry, are at liberty to represent historical personages otherwise than on the basis of historical truth.

If the fiction be like Irving's Knickerbocker's New York, — a burlesque so transparent that no one is for a moment misled, — there is no harm done. But if the tale or poem be of that

character that no one but an expert in history can distinguish between the true and the false, the fact and the fiction, very serious injury may be, in many instances will be, done to the reputation of those who have bequeathed that reputation to posterity, in the hope that it may be preserved untarnished. More especially is this true, if, the prologue says, —

> "the author seeks and strives
> To represent the dead as in their lives."

It is well for the author of the "New-England Tragedies" that the Puritan laws are no longer in force, else he might be called to answer, not only for that he did —

> "perchance misdate the day and year,
> And group events together by his art,
> That in the Chronicles lie far apart,"

but that he did, moreover, interpolate matter which had neither day, nor year, nor chronicle, in point of fact, thereby giving false impressions respecting the truth of history.

The relation of events in their order is one of the first of the requisites of history. Not only the year, but sometimes the very day in which a thing is done, is of the utmost importance to a right understanding of the character of men, and of their acts also.

It is not an immaterial matter, whether the Puritans forbore, at last, to proceed capitally against the Quakers from their own conviction that such a course would cause a great sacrifice of life, and would finally fail of accomplishing their object; or whether, thirsting for blood still, they were stopped by a "mandamus" from Charles II., — who, by the way, had no power to issue such a judicial writ, even if he might amend the charter.

It may not be amiss, therefore, to state, that the last execution, that of William Leddra, took place March 14, 1661; that Wenlock Christison, or, as the record has it, Wendlock Christopherson, who had been banished and threatened with death if he should return, confronting the judges on Leddra's trial with, "I am come here to warn you, that you shed no more innocent blood," was arrested, and, after three months, brought up for trial. Dr. Palfrey says, —

"There was an unprecedented division among the magistrates, and they are said to have been no less than two weeks in debate." — "Christison was condemned to die; but the dreadful sentence could not again be executed. In the mean time, the General Court had met; and the evidences of opposition to any further pursuance of this rigorous policy were unmistakable. The contest of will was at an end. The trial that was to decide which party would hold out longest, had been made; and the Quakers had conquered." [1]

It may be proper for me to add, that Christison, concluding that, if he might have his liberty, he had freedom to depart, was discharged from prison in June, 1661; that King Charles's letter, directing "that, if there were any of those people called Quakers amongst them, now already condemned to suffer death or other corporal punishment, or that were imprisoned and obnoxious to the like condemnation, they were to forbear to proceed any further therein," and should send such persons to England for trial, was dated Sept. 9th, of that year, and received in November. Dr. Palfrey says further: —

"The command, however, produced little effect. The resolution to abstain from further capital punishments had been taken some months before; though the magistrates perhaps were not indisposed to appeal to the King's injunction, rather than avow a change of judgment on their own part." [2]

And it is of some importance to know farther, that, after a representation from the government of the colony to the King on this subject, his Majesty, in a letter dated June 28th, 1662, after saying, that "the end and foundation of the charter was and is the freedom and liberty of conscience," and charging and requiring that freedom and liberty be duly admitted and allowed, so that the "Book of Common Prayer" might be used, and all persons of good and honest lives and conversations be admitted to the sacraments and their children to baptism, adds, —

"We cannot be understood hereby to direct or wish that any indulgence should be granted to those persons commonly called Quakers, whose being inconsistent with any kind of government. We have found it necessary, by the advice of our Parliament here, to make sharp laws against them, and are well contented that you do the like there."

[1] Palfrey, vol. ii. p. 481. [2] Palfrey, vol. ii. pp. 519, 520.

This is the King's final judgment on the matter.[1]

A few days since, a leading newspaper in a neighboring State appended to a courteous notice of this course of Lectures, a very uncourteous paragraph respecting the founders of Massachusetts, saying, that —

"They were simply a band of narrow-minded sectaries, animated by no broad nor generous motives; but aiming to establish a morose and exclusive community, from which every one of broader sympathy and more tolerant spirit should be rigorously shut out."

And then, naming three of the principal men among them, it was said, —

"that, so far from being the promoters of a great movement, they prove, on examination, of very moderate calibre. They were designed for village deacons, rather than for founders of states."

One cannot, and has no disposition to, repress a smile at language like this.

It is neither my duty nor my privilege, at this time, to enter into a discussion respecting the statesmanship of the founders of Massachusetts. But it lies within my province to say here and now, that, but for the religious legislation of the founders of Massachusetts, many persons would have come here, who, like some of those who went to Rhode Island, were not fit for village deacons, nor for any other honest and honorable position.

A clerical friend of mine, in a sermon last Thanksgiving Day, referring to the Puritan Commonwealth and the disturbances by Roger Williams and others, happily remarked, that "every Utopia ought to be supplemented with a Narragansett."

Their experiment of founding and maintaining a civil state upon a basis which should support the worship of God according to the dictates of their conscientious convictions of duty, and an ecclesiastical state combined which should be in harmony with it, and of excluding whatever was antagonistic to its welfare, failed in its exclusiveness; but the change was only in the admission of the element of a more extended liberty of conscience; and of what is dignified by that name without its

[1] Mass. Records, vol. iv. part ii. p. 165; Hutch. Coll. Papers, p. 379.

vitality; with greater liberty also of action. Their failure was partial only; their success, great and enduring.

With an intelligent appreciation of its true principles, they laid here the foundation of civil liberty upheld by law and restrained by law, and of a system of impartial justice.

In the "Body of the Liberties," enacted in 1641, is a prefatory declaration, that —

"We do, therefore, this day, religiously and unanimously, decree and confirm these following Rights, liberties, and privileges, concerning our Churches, and Civil State, to be respectively, impartially, and inviolably enjoyed and observed throughout our jurisdiction for ever."

The first and second declarations following this, are, of themselves, a Massachusetts Magna Charta.

"1. No man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any way indamaged under color of law or Countenance of Authority, unless it be by virtue or equity of some express law of the Country warranting the same, established by a General Court and sufficiently published, or in case of the defect of a law in any particular case, by the word of God. And in Capital cases, or in cases concerning dismembering or banishment according to that word to be judged by the General Court."

"2. Every person within this jurisdiction, whether Inhabitant or foreigner, shall enjoy the same justice and law that is general for the plantation, which we constitute and execute one towards another, without partiality or delay."[1]

The main principle of these declarations is recognized in the constitutions of the States, and of the United States. If it shall be abandoned, and the theory substituted that the general government is to be administered according to the will of the people, as ascertained, from time to time, by the action of Congress, civil liberty in the United States will receive a shock, from which it will never recover under that government.

With a profound conviction of the truth and of the vital importance of their religious principles, they achieved and secured to themselves liberty to worship God according to the dictates

[1] Mass. Hist. Society's Coll. 3d Series, vol. viii. p. 216.

of their consciences. They disclaimed again and again power over the faith and consciences of others. If they were pertinacious in their determination that those who could not join at least in attendance upon their religious worship, and especially that those who placed themselves in hostility to their principles and practice, should find their liberty elsewhere, — their efforts to secure liberty for themselves have resulted in a larger liberty to all others.

With the rod of a persevering industry, they smote the rock of Massachusetts, literally lying in the wilderness; and if the elements of prosperity existing within did not gush forth in immediate profusion, they have since flowed in copious streams to sustain and enrich their descendants.

Let not the conclusion that the Puritans founded their State in order that they might worship God according to the dictates of their own consciences, without admitting others to disturb their worship by contention about doctrines and ordinances, detract from the high estimation in which they have been held, heretofore.

Let us not even presume to believe that they would have effected a better work, had they attempted to provide entire liberty for what every man, woman, and child deemed the dictates of their several consciences.

We are not authorized to say that it would have been better if they had founded a colony on the shores of Massachusetts, with what we call liberty of conscience, — liberty for every one not only to think as he pleases, which the Puritans allowed, but liberty for every one to preach, and harangue, and vituperate, and denounce every other one who differs and dissents from his or her particular notion, — liberty to women to hold conventions, and make pretty invectives against government, and liberty to others to denounce the Constitution which is, or should be, the organic law. All this is supposed to be safe for us. Would it have been safe for them? On what premises shall we maintain such a position? Nay, upon what data shall we persuade ourselves that, forming their infant settlement upon such a foundation, their Patmos would not have been turned into a Pandemonium, — that their experiment would not have proved a disastrous failure in its very inception?

Above all, let us not stultify ourselves by the superlative folly of regarding the Puritans as "a band of narrow-minded sectaries, animated by no broad nor generous motives," who aimed "to establish a morose and exclusive community, from which every one of broader sympathy and more tolerant spirit should be rigorously shut out." Exclusion of the promoters of contention is not the exclusion of persons of the broadest sympathy and the widest toleration.

Let us have a correct understanding of what the Puritans were in their day, which will lead us to very different conclusions.

They were non-conformists. It was their non-conformity, religious and civil, which brought them hither, to establish the principles of their non-conformity, in a colony to be based on the very foundations of their non-conformity.

Thirty years after the death of John Wycliffe, the Council of Constance condemned his opinions and writings; and decreed that his memory should be pronounced infamous, and that his bones, if to be distinguished from those of the faithful, should be removed from the consecrated ground, and cast upon a dunghill. Thirteen years subsequently, in pursuance of this sentence, his remains were taken from their place and burned; and the ashes were cast into the Swift, a brook which empties itself into the Avon.

> "The Avon to the Severn runs,
> The Severn to the sea,
> And Wycliffe's dust shall spread abroad,
> Wide as the waters be."

Many of you recollect those beautiful lines. You know who repeated them, with a reference to the blood of Kossuth, if it should be shed by the Emperor of Russia.

Who was John Wycliffe? A non-conformist, — "The morning star of the Reformation," — the original and type of the non-conformists who, denying the supremacy of King and bishops, as he denied that of the Pope, kindled the spark of civil and religious liberty in England; who cherished and fostered it in the wilderness, until, increasing and extending its beneficent warmth, it shot forth such a light, that the fires of persecution paled before its radiance.

Sneers about village deacons cannot tarnish the reputation of

such men. Detractors may think to cast their dust upon the waters; but, like that of Wycliffe, it "shall spread abroad, wide as the waters be."

If the liberty which they claimed and secured, was, in their day, confined in a great measure to themselves and their institutions; after generations have had the benefit of an expansion of its principles into a more extended freedom.

We may reject their creed. We may regret their austerity. But they will live in history, as they have lived, the very embodiment of a noble devotion to the principles which induced them to establish a colony, to be "so religiously, peaceably, and civilly governed," as thereby to incite the very heathen to embrace the principles of Christianity.

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THE FIRST CHARTER

AND

THE EARLY RELIGIOUS LEGISLATION

OF MASSACHUSETTS.

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